DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 11-199
Title: Alexander Vasquez, Petitioner
v.
United States
Docketed: August 17, 2011
Lower Ct: United States Court of Appeals for the Seventh Circuit
Case Nos.: (09-4056)
Decision Date: March 14, 2011
Rehearing Denied: May 10, 2011
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Aug 8 2011	Petition for a writ of certiorari filed. (Response due September 16, 2011)
Aug 31 2011	Order extending time to file response to petition to and including October 17, 2011.
Oct 17 2011	Brief of respondent United States in opposition filed.
Oct 31 2011	DISTRIBUTED for Conference of November 22, 2011.
Nov 7 2011	Reply of petitioner Alexander Vasquez filed. (Distributed)
Nov 28 2011	Petition GRANTED.
Dec 19 2011	SET FOR ARGUMENT ON Wednesday, March 21, 2012.
Jan 6 2012	The time to file the joint appendix and petitioner's brief on the merits is extended to and including January 23, 2012.
Jan 7 2012	Motion for leave to proceed further herein in forma pauperis filed by petitioner Alexander Vasquez.
Jan 13 2012	Record from U.S.C.A. for 7th Circuit is electronic.
Jan 13 2012	Record from U.S.D.C. for Northern District of Illinois is electronic.
Jan 17 2012	Motion DISTRIBUTED for Conference of January 20, 2012.
Jan 23 2012	Motion for leave to proceed further herein in forma pauperis GRANTED.
Jan 23 2012	Joint appendix filed. (Statement of costs filed)
Jan 23 2012	Brief of petitioner Alexander Vasquez filed.
Jan 30 2012	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. (Distributed)
Jan 30 2012	Brief amicus curiae of Jeffrey K. Skilling filed. (Distributed)
Jan 31 2012	CIRCULATED.
Feb 22 2012	Brief of respondent United States filed. (Distributed)
Feb 29 2012	Brief amici curiae of Texas, et al. filed. (Distributed)
Mar 12 2012	Reply of petitioner Alexander Vasquez filed. (Distributed)

Mar 21 2012	Argued. For petitioner: Beau B. Brindley, Chicago, Ill. For respondent: Anthony A. Yang, Assistant to the Solicitor General, Department of Justice, Washington, D. C.
Apr 2 2012	Writ of certiorari DISMISSED as improvidently granted. Opinion per curiam.
May 4 2012	JUDGMENT ISSUED.

PETITION FOR WRIT OF CERTIORARI

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

ALEXANDER VASQUEZ,

Petitioner,

- v -

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Did the Seventh Circuit violate this Court's precedent on harmless error when it focused its harmless error analysis solely on the weight of the untainted evidence without considering the potential effect of the error (the erroneous admission of trial counsel's statements that his client would lose the case and should plead guilty for their truth) on this jury at all?

2. Did the Seventh Circuit violate Mr. Vasquez's Sixth Amendment right to a jury trial by determining that Mr. Vasquez should have been convicted without considering the effects of the district court's error on the jury that heard the case?

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IN THE SUPREME COURT OF THE UNITED STATES

ALEXANDER VASQUEZ,

Petitioner,

- v -

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Alexander Vasquez, respectfully prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on March 14, 2011.

OPINIONS BELOW

On March 14, 2011, the Seventh Circuit issued a published opinion, affirming Mr. Vasquez's conviction. *United States v. Vasquez*, No. 09-4056, 635 F.3d 889 (7th Cir. Mar. 14, 2011).[1]

[1] A copy of the Opinion is attached as Appendix A.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 2011. Mr. Vasquez filed a Petition for Rehearing, which was denied on May 10, 2011.[2] This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VI.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

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[2] A copy of the order denying Mr. Vasquez's petition for rehearing is attached. as Appendix B.

Fed. R. Crim. P. 52(a).

> (a) Harmless Error.
>
> Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.
>
> (b) Plain Error.
>
> A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

28 U.S.C. § 2111 (Harmless Error).

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

INTRODUCTION

This is a case where a federal Circuit Court of Appeals found that the erroneous admission, for the truth of the matter asserted, of trial counsel's out-of-court statement that his client was guilty was harmless. The Seventh Circuit was only able to reach this conclusion by failing to apply, and misapplying, this Court's precedent regarding harmless error analysis. Courts and legal scholars have long

recognized this Court's conflicting jurisprudence in the area of harmless error analysis. In some cases, the test for harmless error requires one to ask only whether a jury in a hypothetical retrial without the error would surely convict. In other cases, the test asks whether the error had any influence on the jury in this particular case. The majority below relied exclusively on the former, reviewing only what it believed to be overwhelming evidence and failing to consider the prejudicial impact of the erroneously admitted evidence in any way. This conflict between the two tests for harmless error appears in the decisions of nearly every federal circuit court of appeal.

It is not a circuit split in the purest sense because there are no cases in which one circuit explicitly cites another circuit's decision and disagrees with its holding. However, a close look at the harmless error doctrines that have developed in the circuits demonstrates an alarming lack of uniformity. This kind of circuit split is even more important to remedy because it deprives defendants (and the government) of consistency and predictability.

By choosing to look solely to the weight of the government's evidence to conduct the harmless error analysis, the majority below was able to ignore clear indications that the error in this case was central to the jury's decision. The Court should grant *certiorari* to clarify the proper mode of harmless error analysis and ensure that this essential appellate function is performed consistently across the circuit courts of appeal. To allow appellate courts to hypothesize a guilty verdict based solely upon the government's evidence without any concern for the actual effect of

the error (as the majority did in this case) would be to deprive defendants of their right to a jury trial under the Sixth Amendment, as this Court warned in *Sullivan v. Louisiana*.

I.

STATEMENT OF THE CASE

A. District Court Proceedings.

Mr. Vasquez was charged in a two-count indictment with (1) conspiracy to possess with intent to distribute more than 500 grams of cocaine, and (2) attempt to possess with intent to distribute more than 500 grams of cocaine. Each count was an alleged violation of 21 U.S.C. § 846. The district court had original jurisdiction under 18 U.S.C. § 3231.

Mr. Vasquez elected to go to trial and after a two-day jury deliberation, he was convicted of count one (conspiracy) and acquitted of count two (attempt). At trial, the government presented evidence that Mr. Vasquez and his co-defendant, Joel Perez, were arrested on August 5, 2008. On that day, the government had arranged, through a cooperating informant, for a cocaine deal to take place between Perez, the cooperating informant, and another co-defendant, Carlos Cruz. Cruz and Perez drove to a Shell gas station to meet the cooperating informant. Cruz testified that the plan was for them to inspect the cocaine at the Shell station. If it was acceptable, another meeting was to be set up where money could be exchanged for the cocaine. No money was supposed to be exchanged during this meeting.

When Cruz and Perez arrived, the cooperating informant told them to follow him to another location to get the cocaine. Perez was reluctant to follow the cooperating informant to another location. Instead of following the cooperating informant, Perez walked to an adjacent parking lot where Mr. Vasquez was waiting to pick him up in a black Bonneville. Perez got into the Bonneville and called Cruz on a cell phone. He told Cruz that he was not willing to follow the cooperating informant. Cruz then came to the adjacent parking lot and met with Perez, who was seated in the Bonneville driven by Mr. Vasquez. Prior to that time, Mr. Vasquez had nothing to do with the transaction. He was not involved in the negotiations, was never mentioned to the cooperating informant, and was wholly unknown to Cruz. Evidence showed that, according to Cruz (the government's only testifying cooperating witness), Vasquez was not to play any role in the drug transaction.

After speaking to Perez while he sat in the Bonneville, Cruz then called the cooperating informant and told him that they had the money to purchase the cocaine. A few minutes later, law enforcement agents surrounded the parking lot and attempted to arrest Cruz, Perez, and Vasquez. Cruz, who was outside of the car, was arrested. Perez and Vasquez drove away in the Bonneville. Police found the Bonneville in a nearby parking lot. Perez and Vasquez were arrested not far from the parking lot. Inside the Bonneville, the police found a hidden compartment in the passenger side of the dashboard. The compartment contained $23,000. Uncontradicted evidence from multiple witnesses at trial proved that the Bonneville belonged to and was

exclusively used by Perez and his wife. No evidence introduced at the trial ever indicated that Mr. Vasquez was aware of the compartment in Mr. Perez's Bonneville or had any connection to the money contained therein. The government also introduced evidence under Fed. R. Evid. 404(b) that Mr. Vasquez was previously convicted for his participation in a cocaine transaction with Mr. Perez in 2002.

At trial, Mr. Vasquez called Marina Perez, the wife of Joel Perez, to testify. Mrs. Perez testified that her husband had asked her to pick him up at the parking lot where the failed drug deal took place. She testified that she asked Mr. Vasquez to go in her place due to a disagreement she was having with her husband. Mrs. Perez told Mr. Vasquez to use the Bonneville, which was registered to Perez, because the Bonneville was blocking Mr Vasquez's own vehicle in the garage. She testified that this was the only reason that Vasquez ended up going to the Shell parking lot that day.

After Mr. Vasquez rested his case-in-chief, the government filed an emergency motion to continue the trial based on recordings it had obtained of telephone conversations between Perez and his wife, which were recorded while Perez was incarcerated. Mr. Vasquez objected to the admission of any recordings on the basis of hearsay. The district court allowed the government to introduce the recordings and explicitly held that the recordings would be coming in for the truth of the matters asserted. One of the calls that was played for the jury included second-hand hearsay that Mr. Vasquez's attorney—lead trial counsel—had told Mr. Vasquez that he should plead guilty:

Marin Perez: So what'd [Vasquez's lawyer] tell [Vasquez]? What did [Vasquez's lawyer] tell him?

Joel Perez: A blind plea would be good, then he can guarantee this and that. You know what I mean? Just certain things, you know? I got to explain to you.

Marina Perez: He's telling him about a blind plea also?

Joel Perez: Yeah, he is. I gotta explain to you. You know what I mean. He says, if you want, have his wife talk to me, this or that. I have to explain to you tomorrow.

Another recording included a conversation where Marina Perez told her husband that Vasquez's lawyer told her that if they went to trial, "everybody is going to lose." These statements were explicitly admitted for their truth. The attorney who addressed the jury in closing was the very same attorney who the jury was told had instructed Mr. Vasquez to pled guilty and had stated that Mr. Vasquez would lose at trial.

The jury deliberated for two days. During deliberations, the jury requested that the district court provide it with a transcript of Marina Perez's testimony. Eventually, the jury came back with a split verdict, acquitting Mr. Vasquez of attempt, but convicting him of conspiracy.

B. Court of Appeals Proceedings

Mr. Vasquez appealed his conviction to the Seventh Circuit Court of Appeals. Specifically, he argued that the district court's admission of the recorded calls between Mrs. Perez and the codefendant was erroneous. The Court of Appeals issued a split decision. All of the members of the panel agreed that it was erroneous to admit the content of the recorded calls for the truth of the matter asserted. However, the majority concluded that any error was harmless. In reaching this conclusion the majority relied solely on its belief that the other evidence of guilt was overwhelming. Specifically, the majority found the fact that Mr. Vasquez fled from the scene and the admission of the prior conviction for possession with intent to distribute from 2002 to constitute overwhelming evidence. In the end, the majority concluded "[t]his evidence, we believe, would have moved the jury to convict Vasquez without a nudge from anything it heard in the government's rebuttal case."

Judge Hamilton dissented on two grounds. First, he did not agree with the majority that the MCC recordings themselves were admissible. Second, he did not agree that the error could be classified as harmless. Judge Hamilton found that "it is difficult to imagine more prejudicial evidence than the erroneously admitted statements of the defendant's own trial attorney advising the defendant to plead guilty." He described this segment of the tapes as "extraordinary." Judge Hamilton used a different harmless error standard than the majority. Judge Hamilton noted that

the harmless error "standard calls upon an appellate court not to become in effect a second jury." He identified the harmless error rule as set forth in *Neder v. United States*, which requires the appellate court to determine whether the party that benefited from the error has demonstrated "that the error complained of did not contribute to the verdict obtained."

Judge Hamilton then engaged in a detailed analysis, focusing on four factors that prevented him from concluding the error was harmless. First, he discussed the "modest strength of the rest of the government's case against Vasquez." Judge Hamilton compared the evidence against Mr. Vasquez with the evidence against the two codefendants. He noted that both of the co-defendants were recorded making arrangements for the purchase of cocaine. He noted that Mr. Vasquez was not recorded at all and that he was never mentioned in any of the recordings. Moreover, the government agents and the confidential informant were expecting only a single customer and knew nothing about Mr. Vasquez until they saw him arrive in Perez's car. He noted, on the other hand, that the government's evidence established that Mr. Vasquez was at the scene of the planned drug meeting, driving a car with a hidden compartment containing money, and that he fled dangerously from the scene. But, Judge Hamilton noted that Marina Perez's testimony "provided an innocent explanation for Vasquez's presence on the scene in the car with the hidden money."

Judge Hamilton surmised that the only evidence, other than the flight evidence, that was arguably inconsistent with Marina Perez's testimony

was the statement by the cooperating co-defenant, Cruz, that Mr. Vasquez stated "[t]ell him we got the money here" while the three defendants were in the Denny's parking lot. Unlike the majority, however, Judge Hamilton did not take Cruz's testimony as uncontroverted fact. Judge Hamilton noted that Cruz was a "cooperating codefendant with powerful incentives to help the government prove its case against Vasquez." He noted that Cruz "admitted having lied to the government about Vasquez on several other subjects." Most importantly, Judge Hamilton noted that "Cruz admitted he first told the government about Vasquez's supposed 'money' comment less than one week before trial."

Judge Hamilton also considered that the jury acquitted Mr. Vasquez of attempted possession with intent to distribute, meaning that the jury did not find all of the government's evidence fully persuasive. Judge Hamilton noted the extreme importance the government attached to Marina Perez's testimony. He described the government's "extraordinary efforts to obtain its admission." Judge Hamilton found further support for this fact in "the government's emphasis on the improper evidence in its closing argument." Finally, Judge Hamilton noted the inherently harmful nature of having the very attorney whose admitted statements indicated that Mr. Vasquez should lose the case address the jury in closing and argue that Mr. Vasquez was innocent. He asserted that the Court's erroneous admission of the recordings left Mr. Vasquez's defense attorney without the credibility necessary to meaningfully argue on his behalf in closing.

Mr. Vasquez then filed a Petition for Rehearing and Rehearing En Banc, arguing that the Seventh Circuit had erred in its harmless error analysis. Mr. Vasquez argued that the harmless error doctrine used by the Seventh Circuit in this case was inconsistent with this Court's precedent and was inconsistent with the decisions of other courts of appeals. The court denied the Petition for Rehearing without comment on May 10, 2011. See Appendix B.

This petition follows.

II.

REASONS FOR GRANTING THE PETITION

A. This Case Exemplifies the Two Competing Modes of Harmless Error Analysis that are Used Throughout the Circuit Courts of Appeal.

The appellate court in this case had concrete evidence regarding the thought process of the jurors who decided the case against Mr. Vasquez. Through its split verdict and its request to review the transcript of Marina Perez's testimony, the jury plainly signaled the centrality of the district court's error (erroneously admitting recorded statements for their truth to discredit Mrs. Perez) to its verdict. The majority below completely disregarded this evidence, failed to address the impact the Court's error might have had on the jury, and asked only whether there was overwhelming evidence of guilt aside from the improperly admitted testimony. On the other hand, the dissent below considered the specific error involved and how it must have influenced the jury in conjunction with the other

evidence. This result begs the question "how could the judges engage in such different modes of analysis?" The answer is that they applied different tests.

Legal scholars and commentators have long recognized that two competing tests have emerged for determining whether an error is harmless. The first test inquires whether the error had any effect on the verdict. The second test inquires whether there was overwhelming evidence of guilt that was untainted by the error. See Gregory Mitchell, 82 Cal. L. Rev. 1335, 1339 (1994) (noting that "courts evaluate harmless error under one of two tests or a hybrid of the two"); Harry T. Edwards, To Err is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?, 70 N.Y.U. L. Rev. 1167, 1170-1171 (1995) (distinguishing between a "guilt-based approach" and an "effect-on-the-verdict-approach" in determining whether an error is harmless); Charles S. Chapel, The Irony of Harmless Error, 51 Okla. L. Rev. 501, 504 (1998) (identifying two tests, one considering "the effect of the error on the verdict," the other requiring "a consideration of the evidence of guilt); Jason M. Solomon, Causing Constitutional Harm: How tort law can help determine harmless error in criminal trials, 99 Nw. U. L. Rev. 1053, 1055 (2005) (noting that "[t]he conventional wisdom on harmless-error doctrine is that there are two different and irreconcilable approaches that judges use in determining harmless error which are reflected in two co-existing lines of Supreme Court cases); Roger A. Fairfax, Jr., Harmless Constitutional Error and the Institutional Significance of the Jury, 76 Fordham L. Rev. 2027, 2037 (2008) (noting that the Supreme "Court has shifted between the two standards – harmlessness based upon whether the error

contributed to the verdict and harmlessness based upon whether the residual evidence was overwhelming"); Jeffrey O. Cooper, Searching For Harmlessness: Method And Madness in the Supreme Court's Harmless Constitutional Error Doctrine, 50 U. Kan. L. Rev. 309, 311 (2002) (tracing the development of "two tests for constitutional harmless error [], one focusing on the effect that the error ... had on the deliberations of the jury, and one focusing on whether the evidence properly before the jury was overwhelming"); *Holand v. Attorney General of New Jersey*, 777 F.2d 150, 158 (3d Cir. 1985) (crediting the idea that "the Supreme Court has variously formulated the harmless error standard, in some cases inquiring whether the constitutional error might have contributed to a guilty verdict and in others whether the non-tainted evidence was overwhelming to support the jury's verdict); *United States v. Peck*, 102 F.3d 1319, 1326 (2d Cir. 1996) (Newman, CJ concurring) (noting the uncertainty present in "most cases" of "whether the reviewing court is to consider the effect of the error on the jury or predict what verdict would have been rendered in the absence of the error").

Unlike traditional circuit splits that occur when this Court's precedent leaves a question unresolved, the split regarding harmless error is present not only between the circuits but within circuits. The split decision in this case demonstrates this fact. However, the Seventh Circuit as a whole appears to have endorsed a test focusing solely on the overwhelming nature of the untainted evidence. In *Lanier v. United States*, 220 F.3d 833, 839 (7th Cir. 2000), the Seventh Circuit explicitly endorsed the overwhelming untainted evidence test. In that case, the defendant argued "that

the test for evaluating harmless error is whether it is apparent beyond a reasonable doubt that the error did not contribute to the verdict at all." *Id.* The Seventh Circuit rejected this formulation stating, "this is not the proper test." *Id.* Instead, the panel stated that the test was "is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?" *Id.* (citing *Neder v. United States*, 527 U.S. 1, 18 (1999).

Harmless error analysis is probably the most cited doctrine in the criminal law, and its consequences are significant. The outcome of the harmless error analysis means the difference between offering a remedy for an injury to an individual's rights and making the decision that such an injury is an acceptable cost of an expedient criminal justice system. With such significant consequences hanging in the balance, it is imperative that the doctrine be applied consistently.

As the majority opinion and dissent below demonstrate, even within a single circuit, the mode of analysis can differ significantly and result in opposite conclusions. The level of detail of the analysis also varies significantly depending on the test that is used. For instance, the Second Circuit, which tends to utilize the effect of the error test, utilizes an extensive series of factors that requires the reviewing court to engage in a detailed analysis. See *Wray v. Johnson*, 202 F.3d 515, 526 (2d Cir. 1998). In *Wray*, the Second Circuit noted that "the principal factors to be considered are the importance of the witness's wrongly admitted testimony, and the overall strength of the prosecutions case. *Id.* When assessing the importance of wrongly

admitted evidence, the Second Circuit looks to (1) whether the testimony bore on an issue that is plainly critical to the jury's decision, (2) whether the wrongly admitted evidence was material to the establishment of the critical fact or whether it was instead corroborated and cumulative, and (3) whether the wrongly admitted evidence was emphasized to the jury. *Id.*

Had the majority below applied this standard, its analysis would have been wholly different. Instead of focusing narrowly on the other evidence admitted at trial, the majority would have been forced to first address the nature of the error in the context of the trial. The error here meant that the jury heard testimony that defense counsel had stated both his belief that the defendant should plead guilty and his belief that, if the defendant went to trial, everyone was going to lose. This is a unique kind of error. The district court specifically stated that these statements, despite the multiple levels of hearsay, were admitted for the truth of the matters asserted. The matter asserted was the guilt of the defendant, and the matter was asserted by a person who, other than the defendant himself, was probably in the best situation to know. If the alleged statements of counsel were simply accepted by the jury (and why would they not be since they are essentially statements against the interest of the declarant's own client to whom he has a fiduciary duty), then the jury would believe the defendant was guilty independent of any other evidence that was presented. In that sense, the evidence is most properly comparable to a confession. The defendant's guilt is the ultimate issue and a statement that the defendant is guilty is "plainly critical to the jury's decision" in every case. *Wray, 202 F.3d at 526.*

The Second Circuit analysis also directs reviewing courts to determine the extent to which the wrongly admitted evidence was emphasized. The majority and the dissent below differed widely in their analysis in this area. The majority did not even consider the extent to which the wrongly admitted evidence was emphasized. The dissent, on the other hand, specifically noted that the government emphasized the evidence in closing argument. The majority's failure to engage in this analysis generated a different result than would have likely been reached if the Second Circuit's harmless error test were utilized.

The Third Circuit has similarly rejected an approach that focuses solely upon overwhelming evidence. *Gov't of the V.I. v. Martinez*, 620 F.3d 321 (3d Cir. 2010). In *Martinez*, the Third Circuit noted that it had "never held, nor do we now, that the amount of incriminating evidence is the only factor implicated in a *Doyle* harmless-error analysis." *Id.* at 338. "[T]he relevant question ... is not whether in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." *Id.* at 337 (quoting *United States v. Korey*, 472 F.3d 89, 96 (3d Cir. 2007)).

The Fourth Circuit similarly does not attach conclusive importance to the reviewing court's view of whether there was overwhelming evidence of guilt. The Fourth Circuit considers three factors in determining whether an error is harmless: "(1) the centrality of the issue affected by the error; (2) the steps taken to

mitigate the effects of the error; and (3) the closeness of the case." *United States v. Ingram*, 27 F.3d 564 (4th Cir. 1994). The third factor clearly incorporates whether the reviewing court believes there was overwhelming evidence of guilt. However, the Fourth Circuit has been clear that the purpose of addressing the weight of the evidence is not merely to determine whether the remaining evidence would have been sufficient to convict, "but whether it is sufficiently powerful in relation to the tainted evidence to give fair assurance that the tainted evidence did not substantially sway the jury to its verdict." *United States v. Ince*, 21 F.3d 576, 584 (4th Cir. 1994). The Fourth Circuit has also importantly looked to factual indications that the jury in the particular case under review may have viewed the case as close. See *Untied States v. Curbelo*, 343 F.3d 273, 287 (4th Cir. 2003) (noting that where the jury acquitted defendant on five of eleven counts and the same witnesses testified as to each count, evidence was not overwhelming and a reasonable juror could have found evidence lacking as to the remaining counts absent the error).

The Sixth Circuit has squarely addressed the issue and found that the proper analysis focuses on whether the error in question affected the particular jury that decided the case, not whether there was overwhelming evidence such that an error free trial would surely result in a guilty verdict. *Wilson v. Mitchell*, 498 F.3d 491, 504 (6th Cir. 2007) (noting that the proper analysis looks to "whether the error had an actual impact on the verdict ... and not ... whether a hypothetical new trial would likely produce the same result").

The Eighth Circuit has announced a test for assessing harmless error in the context of *Doyle* error. Where a *Doyle* violation has been found, the Eighth Circuit looks to four factors: (1) "whether the government made repeated *Doyle* violations," (2) "whether any curative effort was made by the trial court," (3) whether the defendant's exculpatory evidence is transparently frivolous," and (4) "whether the other evidence of guilt is otherwise overwhelming." *United States v. Martin*, 391 F.3d 949, 955 (8th Cir. 2004) (citing *Bass v. Nix*, 909 F.2d 297, 305 (8th Cir.1990)).

The Ninth Circuit explicitly directs courts to look to facts about jury deliberations that tend to demonstrate that an error was not harmless. "Longer jury deliberations weigh against a finding of harmless error because lengthy deliberations suggest a difficult case." *United States v. Lopez*, 500 F.3d 840 (9th Cir. 2007) (quoting *United States v. Velarde-Gomez*, 269 F.3d 1023, 1036 (9th Cir. 2001)). Similarly, the Ninth Circuit has considered the fact that a jury reached a split verdict. *Eslamia v. White*, 136 .3d 1234, 1239 (9th Cir. 1998) ("The prosecution case was far from overwhelming, as evidenced by the fact that the jury took 10 days to deliberate, repeatedly questioned the trial judge about the law and requested the rereading of testimony, and ultimately acquitted Eslaminia on the charge of conspiracy to murder and the lesser offense of solicitation of another to commit the crime of kidnapping").

The Tenth Circuit has phrased the test in different terms, on some occasions asking "whether the jury would have returned the same verdict absent the

error," *United States v. Nash*, 482 F.3d 1209 (10th Cir. 2007), and on other occasions asking whether "the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the codefendant's admission is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error." *United States v. Glass*, 128 F.3d 1398 (10th Cir. 1997).

The D.C. Circuit has explicitly considered and rejected an approach that looks exclusively to whether there is overwhelming evidence. In *United States v. Cunningham*, the D.C. Circuit held that "[r]ecent Supreme Court cases, as well as cases from this circuit, have clarified that harmless error review calls for an inquiry as to whether the Government has shown beyond a reasonable doubt that the error at issue did not have an effect on the verdict, not merely whether, absent the error, a reasonable jury could nevertheless have reached a guilty verdict." 145 F.3d 1385 (D.C. Cir. 1998).

The weight of the circuit authority embraces the view that, while overwhelming evidence is an important consideration, it cannot be the sole focus of the harmless error inquiry. Therefore, the greater weight of the circuit authority indicates that the analysis of the majority below was incomplete and insufficient. Courts like the majority below, however, find some support for their exclusive reliance on overwhelming evidence in this Court's conflicting line of cases dealing with harmless error analysis.

B. This Court's Own Precedents are in Conflict Regarding the Appropriate Mode of Harmless Error Analysis.

The varying approaches to, and formulations of, the harmless error standard found scattered throughout the jurisprudence of the Circuit Courts of Appeal can be traced to the inconsistency of this Court's precedent regarding the harmless error analysis. Since the inception of harmless error, the Court has issued varying versions of the harmless error test. The Court first articulated the standard for harmless error in *Kotteakos v. United States*. 328 U.S. 750 (1946). In that case, the Court held that the proper inquiry was not to assess the weight of the untainted evidence. The Court stated:

> it is not the appellate court's function to determine guilt or innocence . . . Nor is it to speculate upon probable reconviction and decide according to how the speculation comes out . . . the question is, not were [the jurors] right in their judgment, regardless of the error or its effect upon the jury. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own.

328 U.S. at 763-764. This formulation of the test was repeated in *Fahy v. Connecticut*. 375 U.S. 85, 86-87

(1963) ("We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction").

Probably the most cited case dealing with harmless error is *United States v. Chapman* where the Court found that harmless error analysis applies to constitutional violations. 386 U.S. 16 (1967). In *Chapman*, the Court formulated the test similarly to *Kotteakos* and *Fahy*: "[t]he question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." 386 U.S. at 22. Despite *Chapman*, the majority below did not even begin to ask that question.

The case most frequently cited as originating the alternative standard that an error is harmless when the appellate court finds that the properly admitted evidence was overwhelming is *Harrington v. California*. 395 U.S. 250 (1969). However, in that case, the Court was careful to note that "[w]e do not depart from *Chapman*; nor do we dilute it by inference. We reaffirm it." *Id.* 254.

Next, in *Schneble v. Florida*, the Court seemed to combine the standards, stating that "[i]n some cases the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the codefendant's admission is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless

error." 405 U.S. 427, 430 (1972). *Schneble*, however, contains what has become one of the most troublesome formulations of the test, and the one adopted by the majority in this case. At the conclusion of *Schneble*, the Court stated "we conclude that the 'minds of an average jury' would not have found the State's case significantly less persuasive had the testimony as to Snell's admission been excluded." *Id.* at 432. This formulation is particularly problematic because common sense tells us that, in a close case, even evidence that does not make the government's case significantly less or more persuasive could still be outcome determinative due to the prejudicial quality of the error. Perhaps that is the reason that, in the thirty-nine years since *Schneble* was decided, the Court has never again used the "significantly less persuasive" formulation. On the other hand, the Seventh Circuit uses it regularly. See, e.g. *United States v. Thorton*, 642 F.3d 599, 605 (7th Cir. 2011) (employing "significantly less persuasive" language); *United States v. Yarrington*, 640 F.3d 772, 780 (7th Cir. 2011) (same); *United States v. Hicks*, 635 F.3d 1063, 1073 (7th Cir. 2011) (same); *United States v. Spagnola*, 632 F.3d 981, 988 (7th Cir. 2011) (same); *United States v. Bell*, 624 F.3d 803, 809 (7th Cir. 2010) (same).

In *Delaware v. Van Arsdall*, the Court addressed the harmless error analysis in the context of a Confrontation Clause violation. 475 U.S. 673 (1986). The Court set forth a list of factors to be considered in determining when a Confrontation Clause violation was harmless. The factors demonstrate that the overall strength of the case against the defendant is but one factor to be considered in determining whether an error is harmless. The factors included (1) "the importance of

the witness's testimony in the prosecution's case," (2) "whether the testimony was cumulative," (3) "the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted," and (4) "the overall strength of the prosecution's case." *Id.* at 279.

The Court most directly addressed the tension between the overwhelming evidence test and the effect on the verdict test in *Sullivan v. Louisiana*. 508 U.S. 275 (1993). In *Sullivan*, the Court stated

> Consistent with the jury-trial guarantee, the question it instructs the reviewing court to consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. Harmless-error review looks, we have said, to the basis on which the jury actually rested its verdict. The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered-no matter how inescapable the findings to support that verdict might be-would violate the jury-trial guarantee.

Id. at 279. But a few years later in *Neder v. United States*, the Court muddied the waters. 527 U.S. 1 (1999). *Neder* involved a unique factual scenario that the Court had not addressed before: there was a jury instruction error where an element of the offense was omitted. The Court rejected the defendant's argument that under *Sullivan* the error could not be deemed harmless because the jury never reached a verdict with regard to the omitted element. Instead, the Court held that "[i]n a case such as this one, where a defendant did not, and apparently could not, bring forth facts contesting the omitted element, answering the question whether the jury verdict would have been the same absent the error does not fundamentally undermine the purposes of the jury trial guarantee." *Id.* at 19.

Because *Neder* did not purport to overrule *Sullivan*, it leaves a troubling dissonance in the Court's jurisprudence. Did *Neder* hold that the only relevant question is whether the evidence in the record is overwhelming such that a trial without the error would result in a guilty verdict? Or, does *Neder* announce a more subtle rule limited to those rare situations where the error in question is the omission of an element and the record makes clear that the defendant did not and could not have contested the omitted element? The answer to these questions affects thousands of cases every year, yet the answers remain unclear and courts remain free to adopt inconsistent standards of their choosing.

The lion's share of the Court's harmless error jurisprudence points to a hybrid analysis that considers the weight of the untainted evidence, but also looks to the specific circumstances of the case to determine

whether *this* jury could have been influenced by the error. Had the majority below followed this analysis, Mr. Vasquez would have been granted a new trial. The facts plainly indicated that the error concerned the central witness in the trial in the eyes of both the jury and the government. Moreover, had the majority engaged in a detailed analysis of the effect of the error, as the dissent did, it would have granted Mr. Vasquez a new trial.

C. The Choice of Harmless Error Test Was Outcome Determinative in This Case.

The majority below was able to characterize the admission of the defendant's own attorney's statement that the defendant should plead guilty and would lose the case at trial as harmless by considering only the government's untainted evidence and giving no consideration whatsoever to the actual impact that the erroneous admission of counsel's statements for their truth could have had on the jury. Had the majority employed a test that considered the magnitude of the error and its potential prejudicial impact, as well as the concrete indications from the government and the jury that the evidence was critical, it could not have found the error harmless. A proper harmless error analysis looks to three things: (1) the strength of the government's case absent the erroneously admitted evidence, (2) the effect that the error had in the context of the trial, and (3) any indications as to the importance of the evidence to the jury.

Consideration of the weight of the government's

evidence is appropriate because the more untainted evidence there was on which to base a verdict, the less likely it is that the jury relied on the erroneous evidence to reach its verdict. Here, the majority focused on the evidence of flight and the evidence of a prior drug conviction as the government's strongest evidence. Both of these forms of evidence are not only circumstantial, but also have been repeatedly criticized for unduly and unfairly influencing the minds of jurors. See *Michelson v. United States*, 335 U.S. 469, 475-476 (1948)(noting that "[t]he State may not show defendant's prior trouble with the law" because "it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge"); *Wong Sun v. United States*, 371 U.S. 471, 484 n. 10 (1963)("we have consistently doubted the probative value in criminal trials of evidence that the accused fled the scene of an actual or supposed crime). The fundamental error in the majority's analysis, however, lies not in its misassessment of the strength of the government's case, but in its failure to consider the prejudicial impact of the error and the central role that it played in the trial.

Perhaps the closest analogy to the error in this case is an erroneously admitted confession. In both cases, there is a direct statement, from a person in a position most likely to know, that the defendant is guilty of the crime with which he is charged and should lose his case at trial. Unlike the incriminating statement of a cooperating witness, the source of the statement (in this case, the defendant's trial attorney) cannot be discredited. The idea that the admission of

what was roughly analogous to a confession of the defendant's guilt did not have any impact on the jury is absurd. Yet, because of their decision to focus only on the untainted evidence and ignore the impact of the error completely, the majority failed to even consider how these statements could have impacted the jurors.

Another factor the majority failed to discuss due to its exclusive focus on the weight of the untainted evidence is the fact that no limiting instruction was given. The district court admitted the statements for the truth of the matter asserted. The jury was given no reason not to accept the statement of Mr. Vasquez's counsel that he should plead guilty and that he would lose at trial for its truth. A jury who actually accepted that evidence could convict based upon that statement alone since it constitutes probative (though inadmissible) evidence on every element of the offense. Therefore, the majority below failed to consider the fact that the erroneously admitted evidence could have reasonably been the sole basis for a juror's decision to convict. There is no way anyone could contend that such erroneously admitted evidence could not reasonably have impacted the jury's verdict.

In *Arizona v. Fulminate*, this Court found that

> [a] confession is like no other evidence. Indeed, 'the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him.... [T]he admissions of a defendant comes from the actor himself, the most knowledgeable and unimpeachable source of information

> about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so.'

499 U.S. 279 (1991) (citing *Bruton v. United States*, 391 U.S. 123, 139-140 (1968)(White, J. dissenting)). In *Fulminate*, the defendant had confessed twice and only the first confession was determined to be inadmissible. However, despite a second independent confession, this Court was unable to say the error was harmless. *Id.*

The only case where this Court has found a confession to constitute harmless error was *Milton v. Waintright*. 406 U.S. 371 (1972). In *Miton*, the defendant had confessed to the crime three times and only one was found inadmissible. One of the confessions involved the defendant reconstructing the murder and pictures of this reconstruction were admitted. In no case has this Court ever found that the erroneous admission of a confession was harmless in the absence of another admissible confession.

Here, the trial attorney's assertion that his client would lose the case and should plead guilty amounted to a confession of the defendant's guilt provided by the most reliable of sources. The notion that a jury would be wholly unaffected by the erroneous admission of these statements from trial counsel for their truth is an absurd one. Had the majority below considered the nature and potential impact of the erroneously admitted evidence, it is obvious that it would have come to a different result.

The decision to focus only on the untainted evidence and the question of whether that evidence would convict the defendant absent the erroneously admitted evidence determined the outcome of the case. Had the majority followed the lead of the majority of Circuits and considered the potential impact of the error, the outcome would have been different.

The improperly admitted testimony was admitted for the purpose of undermining the testimony of Marina Perez, who, as the dissent explained, provided an innocent explanation for Mr. Vasquez's presence at the scene of the drug deal. Marina Perez's testimony was damaging enough to the government's case that it sought an emergency continuance to obtain the recordings, which were later erroneously admitted for their truth. The government repeatedly referenced the recordings in its closing argument. But, the most important facts excluded from the majority's analysis were the jury's request to have a transcript of Marina Perez's testimony provided to them and the jury's unanimous decision that the government did not prove beyond a reasonable doubt that Mr. Vasquez attempted to complete the drug transaction. These facts are proof positive that the erroneously admitted evidence was at the forefront of the jurors' minds.

However overwhelming the majority may have found the evidence of flight and the 404(b) evidence to be, the jury did not ask to hear the description of the flight during deliberations. The jury did not ask to see a description of the previous drug convictions. In the final analysis, the jury did not believe the 404(b) evidence was sufficiently probative on intent to find that Mr. Vasquez attempted to possess with intent to

distribute the cocaine. The jury found the government's evidence to be so underwhelming that it acquitted Mr. Vasquez of Count Two despite the government's urging to the contrary. This is compelling evidence that the erroneously admitted statements were at the forefront of the juror's consideration. Had the majority considered these facts, it would almost certainly have come to a different decision. Yet, the majority's reliance only on the overwhelming evidence test prevented any consideration of these fundamental and vital facts, which proved that the jury was almost certainly impacted by erroneously admitted evidence.

Additionally, the majority also failed to consider how the erroneously admitted statements attributed to trial counsel may have impacted Mr. Vasquez's ability to present a defense. Because of the erroneous admission of these statements for their truth, trial counsel was forced to argue the innocence of a defendant who, according to the recordings, he believed to be guilty. The jury was confronted by an attorney who, according to the evidence it could consider for its truth, knew his client to be guilty and believed he should lose the case. The admission of these recordings for their truth discredited Mr. Vasquez's only advocate in the midst of his trial. It made the successful defense of Mr. Vasquez essentially impossible. It is hard to imagine any error that could have had a more severe impact on a jury. No jurist who considered that impact could possibly say it did not affect the jury's verdict. Yet, the majority failed to even consider this impact despite the fact that considering the impact of the error is an essential element of most of its sister Circuits' harmless error analysis and part of the analysis that

was promulgated in *Chapman* by this Court.

The absence of a consistent harmless error test, which requires the consideration of the potential impact of the error on the jury, allowed the majority below to wholly fail to consider the devastating impact that the erroneous admission of a trial attorney's statements that the defendant would lose the case and should plead guilty for their truth. That is an injustice that requires remedy from this Court.

D. The Seventh Circuit's Harmless Error Analysis Denied Mr. Vasquez His Sixth Amendment Right To A Trial By Jury.

The Sixth Amendment guarantees to criminal defendants the right to a trial by jury. U.S. Const. amend. VI. "The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered." *Duncan v. State of La.*, 391 U.S. 145, 155 (1968). The invocation of harmless error analysis implicates the jury trial right because one of the purposes of that right is to protect "against arbitrary law enforcement." *Id.* at 156. The harmless error inquiry asks courts to choose which laws and rules are worthy of enforcement in a particular case. When the analysis is not conducted carefully according to the precedents of this Court, it wrests from the hands of the jury the power the Constitution has assigned to juries alone: the power to determine guilt or innocence.

The undeniably laudable goals of the harmless error analysis, efficiency and finality, ultimately must founder upon the shores of perhaps the most fundamental constitutional right: the right to be judged by twelve peers before a criminal conviction can be entered. "The Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to "the unanimous suffrage of twelve of his equals and neighbours," rather than a lone [or, in this case, three] employee[s] of the State." *Blakely v. Washington*, 542 U.S. 296, 313 (2004).

As the Court most clearly noted in *Sullivan*, when an appellate court endeavors "to hypothesize a guilty verdict that was never in fact rendered," the court "violate[s] the jury trial guarantee." 508 U.S. at 279. In this case, the majority's exclusive focus on what it believed to be overwhelming evidence without any consideration of the effect of the error on the jury in this case was just such a violation. The majority hypothesized a trial that did not involve the admission, for their truth, of trial counsel's statements that his client should lose the case and plead guilty and based its analysis only on that trial that did not occur. In so doing, the majority denied Mr. Vasquez his right to be tried by a jury. This Court should grant certiorari to remedy this Constitutional violation and set appropriate boundaries for harmless error analysis.

III.

CONCLUSION

The Seventh Circuit's exclusive focus on the strength of properly admitted evidence and failure to consider concrete facts that demonstrate that the error likely affected this jury brings to the forefront the continuing confusion regarding the proper application of the harmless error analysis that is present throughout the circuit courts of appeal and this Court's own jurisprudence. For these reasons, the Court should grant the petition for a writ of *certiorari*.

Respectfully submitted,

August 4, 2011

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 09-4056

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ALEXANDER VASQUEZ, JR.,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 1:08-cr-00625-3—**Charles R. Norgle, Sr.**, *Judge.*

ARGUED NOVEMBER 5, 2010

DECIDED MARCH 14, 2011

Before EVANS, SYKES, and HAMILTON, *Circuit Judges.*

EVANS, *Circuit Judge.* A jury convicted Alexander Vasquez of conspiring to possess more than 500 grams of cocaine with intent to distribute. He was subsequently sentenced to serve a term of 240 months. On appeal, Vasquez asks us to reverse his conviction and remand the case for a new trial on several grounds: that the judge (1) should have excluded evidence of his prior drug conviction; (2) should have granted his motion to suppress evidence found in a warrantless search of an automobile; (3) deprived him of a meaningful opportunity to cross-examine a government

witness; and (4) should not have admitted recordings of telephone conversations between a defense witness and a co-defendant. We begin with the facts.

Vasquez and two co-defendants, Joel Perez and Carlos Cruz, were arrested in Arlington Heights, Illinois, following a failed cocaine transaction. The day's events started in the parking lot of a Shell gas station, moved to a nearby parking lot at a Denny's Restaurant, and finally to the shared parking lot of a Walmart and McDonald's. The deal that flopped began several days earlier when Perez contacted Cruz about obtaining a kilogram of cocaine. Cruz then called Alejandro Diaz, whom he knew to be involved in cocaine deals. Cruz, however, didn't know that Diaz was cooperating with law enforcement agents. Cruz, Perez, and Diaz arranged for a deal to go down in Arlington Heights on August 5, 2008.

On the day that it all came tumbling down, Cruz and Perez, with Cruz driving, went to the Shell station for the deal. There, they met Diaz who instructed them to follow him to another location to get the cocaine. Instead, Perez walked to the Denny's parking lot next door where Vasquez was waiting for him in a black Bonneville. Perez slid into the passenger seat of the car and called Cruz on a cell phone telling him that he was not willing to follow Diaz; he wanted to complete the deal at the current location. Cruz then went to the Denny's lot where he was introduced to Vasquez. Shortly thereafter, Diaz called Cruz to find out why they were not following him. Cruz told Diaz that Perez wanted to complete the deal in the parking lot. Perez told Cruz to tell Diaz that "we got the money here." Vasquez repeated the statement, "tell him we got the

money here." Cruz hung up with the understanding that Diaz was returning to complete the deal.

Several minutes later, and after Diaz contacted his handler, DEA Agent James Chupik, law enforcement agents surrounded the parking lot and approached the Bonneville to arrest Cruz, Perez, and Vasquez. In addition to several unmarked cars, six officers approached the Bonneville on foot. As the officers approached, Cruz, who was outside of the car, raised his hands in surrender. Vasquez's reaction was not nearly as sub- missive. He put the Bonneville in reverse, striking two Arlington Heights police cars. He then shifted gears and headed for the exit. Agent Chupik moved in front of the Bonneville, pointed his gun at Vasquez, and commanded him to stop. But Vasquez showed no signs of stopping so Agent Chupik jumped out of the way as the Bonneville sped out of the parking lot heading west onto the eastbound lanes of Algonquin Road.

A few minutes later, police located the Bonneville abandoned in a nearby Walmart parking lot. A bystander told the police he saw two men run from the vehicle toward a McDonald's. An Arlington Heights detective pursued Vasquez and Perez as they ran through the kitchen of the McDonald's and then out the back door.

At that point, Vasquez and Perez split up, each running in a different direction. But the chase was short lived—they were quickly apprehended by Arlington Heights police. The police found a cell phone on Vasquez, and two cell phones on the ground near Perez. Phone records showed that there were calls between Vasquez and both of Perez's phones the day

before and the day of the arrest.

The Arlington Heights police towed the Bonneville to the police station. During a search of the car later that day, they found a hidden compartment in the passenger side of the dashboard containing $23,000 in cash.

Based on this evidence, a federal grand jury returned an indictment charging Vasquez with conspiring to possess with intent to distribute more than 500 grams of cocaine and with attempting to possess with intent to distribute more than 500 grams of cocaine, each in violation of 21 U.S.C. § 846.

As the case progressed, Vasquez filed a motion to suppress the evidence recovered from the search of the Bonneville and the government filed a motion to admit, pursuant to Federal Rule of Evidence 404(b), evidence of Vasquez's involvement in a cocaine trans- action in 2002. The district judge denied Vasquez's motion and granted the motion filed by the government. The judge found that the police had probable cause to search the Boneville and that the 2002 cocaine transaction, which resulted in a conviction, was admissible to show Vasquez's knowledge and intent under Rule 404(b).

At trial, Agent Chupik testified for the government. Among other things, he testified that he instructed Diaz to have Cruz and his "customers" come to a gas station in Arlington Heights for the transaction. But according to the actual transcript of the call, which the government later published, Cruz referred to a single customer as "him" and "this dude." On cross-examination, Vasquez's counsel attempted to impeach Agent Chupik on this point by refreshing his

memory. The judge limited cross-examination, however, finding that the difference between "customers" and "customer" in this instance was a trivial detail.

Later in the trial, Vasquez called several witnesses, including Perez's wife, Marina. Later still, the judge allowed the government to recall Marina to the stand and, among other things, question her about telephone conversations she had with her husband while the case was still pending.

Ultimately, the jury found Vasquez guilty on the conspiracy count and not guilty on the attempt charge. Issues concerning the recall of Marina to the stand and the telephone conversations she had with her spouse are at the heart of Vasquez's appeal, but we will put them aside for the moment as we consider the other issues raised on Vasquez's appeal.

We begin with Vasquez's claim that the judge should have precluded the government from introducing his prior drug conviction to show his knowledge and modus operandi pursuant to Rule 404(b). We review the judge's ruling for an abuse of discretion. *United States v. Conley*, 291 F.3d 464, 472 (7th Cir. 2002). We will reverse only if the record contains no evidence on which the judge rationally could have based his ruling. Id.

Rule 404(b) provides that evidence of prior acts is admissible to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident," but not "to prove the character of a person in order to show action in conformity therewith." Fed. R. Evid. 404(b). We apply a four-part

test to decide whether Rule 404(b) evidence was properly admitted and will find no error if:

> (1) the evidence is directed toward establishing a matter in issue other than the defendant's propensity to commit the crime charged; (2) the evidence shows that the other act is similar enough and close enough in time to be relevant to the matter in issue; (3) the evidence is sufficient to support a jury finding that the defendant committed the similar act; and (4) the evidence has probative value that is not substantially outweighed by the danger of unfair prejudice.

United States v. Vargas, 552 F.3d 550, 554 (7th Cir. 2008).

Here, the government introduced Vasquez's prior conviction to show that he had previously carried out a cocaine deal with Perez using a hidden compartment in a car. The evidence was not used to show propensity, but rather to show modus operandi. United States v. Montoya, 891 F.2d 1273, 1285 (7th Cir. 1989) (upholding admission of evidence under a modus operandi theory when prior drug offense involved the defendant working with the same person, using a car registered to another person, and using a hidden compartment in the car).

The prior drug deal with Perez was certainly important as it showed that Vasquez's position that he was merely an innocent bystander was a smoke screen. See *United States v. Chavis*, 429 F.3d 662, 668 (7th Cir. 2005) (evidence of a prior drug conviction is admissible when a defendant claims that he was "simply in the wrong place at the wrong time"); *Vargas*,

552 F.3d at 555-56 (evidence that defendant had previously transported narcotics in a trailer made it more likely that he knew about the drugs hidden in the trailer in the instant case, and less likely that he was an innocent victim).

Finally, limiting "instructions 'are effective in reducing or eliminating any possible unfair prejudice from the introduction of Rule 404(b) evidence.'" *United States v. Jones*, 455 F.3d 800, 809 (7th Cir. 2006) (internal citations omitted). Here, the judge properly instructed the jury regarding the purposes for which the Rule 404(b) evidence was introduced.

Therefore, the introduction of Vasquez's prior conviction clearly passes the admissibility test. It was admissible to show Vasquez's knowledge, intent, absence of mistake and modus operandi. The judge did not abuse his discretion in admitting the 2002 cocaine-related conviction.

Next, Vasquez argues that the judge should have granted his motion to suppress the money discovered during the search of the Bonneville. He argues that the police violated his Fourth Amendment rights when they conducted a warrantless search of the car after he was taken into custody. We review a district judge's denial of a suppression motion under a dual standard: "the Court reviews legal conclusions de novo and findings of fact for clear error." *United States v. Jackson*, 598 F.3d 340, 344 (7th Cir. 2010).

The search issue is a dead-bang loser. For one thing, the Bonneville was abandoned, and it's hard to see, under the circumstances here, how Vasquez could argue with a straight face that he maintained an

expectation of privacy in it after he ditched it and bolted off on the run. On top of that, it's clear that the pursuing police had abundant probable cause to believe that drug money was in the car. What was the probable cause? Well, (1) Cruz told Diaz that Vasquez and Perez had the money with them; (2) no money was found during the searches of Vasquez and Perez; and (3) two drug- detection dogs indicated that there were narcotics in the passenger-side dashboard of the car. The motion to suppress was properly denied.

Vasquez also claims that the judge denied him a meaningful opportunity to cross-examine Agent Chupik, in violation of his Sixth Amendment right to confront wit- nesses against him. "Limitations on cross-examination rise to the level of a Sixth Amendment violation when they prevent the exposure of a witness' bias and motivation to lie." *United States v. Smith*, 308 F.3d 726, 738 (7th Cir 2002). But the right to cross-examination is not with- out limitation:

> [T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.

Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986). A Sixth Amendment violation occurs when the defendant shows that he was denied the opportunity to elicit testimony that would be "relevant and material to the defense." *United States v. Williamson*, 202 F.3d 974, 979 (7th Cir. 2000) (internal citation omitted). In this case, the judge found that the information Vasquez

hoped to elicit from Agent Chupik, which Vasquez argues shows bias, was trivial and a collateral issue, and therefore not relevant. We review the judge's ruling for abuse of discretion. *Id.*

Vasquez argues that the judge erred by refusing to allow his counsel to attempt to impeach Agent Chupik with a supposedly inconsistent statement he made in an affidavit. Specifically, when discussing the calls between Cruz and Diaz, Agent Chupik said in his affidavit that there were "customers." In fact, the calls only refer to a single customer. The government points out, however, that in the rest of the affidavit, Agent Chupik refers to a single customer, undercutting Vasquez's argument that Agent Chupik was deliberately lying. If anything, it suggests that Agent Chupik simply misspoke. Moreover, Agent Chupik's affidavit was based on a draft transcript that had been translated from Spanish to English, and neither the draft transcript nor the affidavit were presented to the jury.

It is within the discretion of a trial judge to limit cross- examination, especially when, as here, the discrepancies are minor. See *United States v. Mojica*, 185 F.3d 780, 788-89 (7th Cir. 1999) (district court did not abuse discretion in limiting cross-examination of a witness regarding prior drug use when the inconsistencies were "no more than minor discrepancies"). Thus, the judge did not abuse his discretion when he limited Vasquez's cross-examination of Agent Chupik.

Vasquez also argues that the judge erred in ruling that the he could not use transcripts to refresh Agent Chupik's memory. The Government acknowledges that

this was an error, but responds that it was harmless because the judge ruled irrelevant the point on which Vasquez was trying to refresh Agent Chupik's memory. Evidentiary rulings are reviewed for an abuse of discretion. *United States v. Schalk*, 515 F.3d 768, 774 (7th Cir. 2008).

Vasquez is correct—the judge incorrectly stated that there was "no basis to cross-examine with respect to something not in evidence." A document does not need to be "admissible as substantive evidence in order to be used for the purposes of impeaching a witness (or refreshing his recollection)." *Pecoraro v. Walls*, 286 F.3d 439, 444 (7th Cir. 2002). But the government is correct that it is within the judge's discretion to preclude counsel from refreshing a witness' memory on a point the judge has ruled trivial and a collateral issue. There- fore, while the judge's ruling was in error, it was harmless error at best in this case.

Finally, we turn to Vasquez's primary argument, the resolution of which is where we part company with our dissenting colleague. Vasquez asserts that the district judge erred in several respects regarding the recalling of Marina as a witness in the government's rebuttal case and, more importantly, in admitting into evidence the Metropolitan Correctional Center (MCC) recordings of her telephone conversations with her husband.

There's no doubt that Vasquez's trial would have been cleaner had Marina Perez not been injected into the show. But to put things in perspective, it's best to step back for a moment and look at the big picture. Joel Perez and Cruz pled guilty to the charges against them. Vasquez, however, elected to go to trial. Instead

of relying on a generalized defense—that the government failed to prove his guilt beyond a reasonable doubt—Vasquez elected to offer something in the nature of an actual affirmative "defense" on the merits. It would be that he was only an innocent bystander who just happened to be in the wrong place at the wrong time. In the real world of criminal court trials, that sort of "defense" is difficult to sell. And it's especially hard to sell when a defendant, like Vasquez here, elects not to take the stand and tell the jury his version of how he just happened to be where the drug deal was about to go down. So how does he get this "defense" before the jury? Enter Marina. She was his only hope, and a slim one at that.

When called by Vasquez as a witness, Marina said that her husband, earlier in the day, asked her to pick him up at the place where the drug deal died. But later, she asked Vasquez to go in her place. He agreed, and he took the Bonneville, rather than his own car, only because it was more convenient to do so. So if believed, the jury might think that Vasquez had no idea a drug deal was in play and that he just showed up by pure happenstance with a car full of cash stashed away in a hidden compartment. The if is a mighty big if, especially when one considers that the jury knew that Vasquez had participated in a remarkably similar drug deal involving cocaine, Perez, some $15,000 in cash, and a car in 2002.

The government obviously thought Marina's tale was a fish story. Based on the way the case stood at the time, the government could have let Marina leave the stand after a short cross-examination. That might have been the safest course to take. But instead, the

government filed a motion to continue the trial over the weekend based on recordings it had obtained of telephone conversations between Marina and her husband, who was incarcerated at the MCC at the time. The government argued that the conversations between the two went directly to the truthfulness and accuracy of Marina's testimony and raised potential conflict-of- interest issues. Vasquez's counsel objected to the government's motion to no avail. The judge held that the MCC recordings were admissible as extrinsic evidence of Marina's interest, bias and prejudice, and of her prior inconsistent statements.

When the trial resumed, the government called Marina in its rebuttal case and published four recorded conversations between her and her husband. During questioning, Marina acknowledged that she had met with Vasquez's lawyer several times before August 20, 2009 (the only meeting she mentioned in her direct testimony). She also admitted that she understood that Vasquez's lawyer could get Perez a lower sentence and that the lawyer wanted Perez to enter a plea and avoid implicating Vasquez. Defense counsel's objection to Marina's testimony was overruled. And then the MCC recordings came in. They included this exchange:

Marina: So what'd Beau [Vasquez's lawyer] tell him [Vasquez]? What did Beau tell him?

Perez: A blind plea would be good, then he can guarantee this and that. You know what I mean? Just certain things, you know? I got to explain to you.

Marina: He's telling him about a blind plea

also?

Perez: Yeah, he is. I gotta explain to you. You know what I mean. He says, if you want, have his wife talk to me, this or that. I have to explain to you tomorrow.

The jury also heard Marina tell her husband that Vasquez's lawyer also said "everybody is going to lose" if they go to trial.

Vasquez argues that the judge abused his discretion in allowing the government to recall Marina during its rebuttal case solely for the purpose of impeachment. He is correct that "a party may not call a witness for the sole purpose of impeaching him." *United States v. Giles*, 246 F.3d 966, 974 (7th Cir. 2001). But Rule 611 gives the district court authority to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to . . . make the interrogation and presentation effective for the ascertainment of the truth." Fed R. Evid. 611. Furthermore, the judge has "broad discretion to determine whether the government's evidence [falls] within the proper scope of rebuttal." *United States v. Liefer*, 778 F.2d 1236, 1249 n.11 (7th Cir. 1985) (no error when court allowed government to recall two defense witnesses as government rebuttal witnesses).

Here, the government recalled Marina after it discovered the recorded conversations because it believed that they proved she was biased. Vasquez argues that the judge abused his discretion in allowing the government to recall Marina because it had an opportunity to cross-examine her previously. But there

is no authority for the odd proposition that allowing a party to recall a witness based on new information is an abuse of discretion. The government sought to introduce evidence that one of Vasquez's main witnesses was biased. The judge did not abuse his discretion in allowing the government to recall Marina for this purpose.

Second, Vasquez argues that the MCC recordings were inadmissible hearsay. Extrinsic evidence of a witness' bias, however, is admissible to impeach that witness and is never a collateral issue. *United States v. Lindemann*, 85 F.3d 1232, 1243 (7th Cir. 1996). In the recordings, Marina says she talked with Vasquez's counsel several times about the future of both Vasquez and her husband, and that she believed counsel could help her husband get a lower sentence. The government offered the recordings to prove that Marina had an incentive to lie—to get her husband a lower sentence. Moreover, when the government questioned Marina about the calls, her answer supported the government's theory:

> Government: And you thought that the defendant's attorney was recommending that your husband enter a plea where he did not admit the role of Alexander Vasquez, isn't that right?
>
> Marina Perez: Where [Perez] did not admit, yes, be- cause [Vasquez] is going to trial.

Accordingly, Marina's testimony and the MCC recordings were admissible as extrinsic evidence to show

Marina's bias and interest in trying to get her husband a lower sentence.

The recordings are also admissible as prior inconsistent statements. Vasquez argues that prior inconsistent statements must be "in fact inconsistent" under Federal Rule of Evidence 613. *United States v. Crovedi*, 467 F.2d 1032, 1037 (7th Cir. 1972). But "two statements need not be diametrically opposed to be inconsistent." *United States v. Jones*, 808 F.2d 561, 568 (7th Cir. 1986). Here, the government argued that Marina's statements to her husband—that he and Vasquez were in trouble and likely to be convicted—is arguably inconsistent with her story that it was her idea that Vasquez took the Bonneville on the day of the deal. While there may well be other ways to look at this situation, we do not believe that the judge abused his discretion in permitting her to be questioned on the point.

The admission into evidence of the MCC recordings themselves, however, is a horse of a different color. The government argues that the judge did not err because it never sought to admit the recordings for their truth. But the government's argument ignores the fact that the judge said, without question, that "[w]ith respect to interest, bias, and prejudice . . . if any of these statements can be interpreted as such to indicate an interest, bias or prejudice, *they would go in for their truth.*" (emphasis added). Vasquez is correct—on this point, the judge made the wrong call. But Vasquez gets no traction on this point if the error in admitting the MCC recordings for their truth was harmless. See *United States v. Olano*, 507 U.S. 725, 734 (1993). "The test for harmless

error is whether, in the mind of the average juror, the prosecution's case would have been 'significantly less persuasive' had the improper evidence been excluded." *United States v. Emerson*, 501 F.3d 804, 813 (7th Cir. 2007). On appeal, the burden lies on the government to prove that a reasonable jury would have reached the same verdict without the challenged evidence. *United States v. Williams*, 493 F.3d 763, 766 (7th Cir. 2007).

Looking at the evidence as a whole, although the issue is close, we believe that the error was harmless. What was the evidence? We start with Vasquez's flight as possible evidence of guilt. While we agree with our dissenting colleague that flight evidence must be viewed with caution, *United States v. Robinson*, 161 F.3d 463, 469 (7th Cir. 1998), we think it's important to note that there are degrees of flight. A defendant walking down a street who runs into a yard and then into a house after he hears an officer say, "Stop, police" is one thing. The flight here goes far beyond that. If there were degrees of flight, what happened here would be flight in the first degree. How else do you describe throwing the Bonneville into reverse, endangering officers (recall that Agent Chupik, with gun drawn, had to jump out of the way), hitting two police squad cars, and gunning it the wrong way into a roadway from the parking lot, ditching the car a few moments later and trying to escape by running through the kitchen and out the back door of a McDonald's?

Add to that, we have the cell phone logs showing several Perez\Vasquez contacts leading up to the aborted deal and Vasquez saying to Cruz "tell him we got the money here." And then there's the striking similarity between this caper and the one (also with

Perez) that lead to Vasquez's drug conviction in 2002. The $23,000 in cash found in the hidden compartment of the Bonneville (recall $15,000 was hidden in the car during the 2002 deal) puts a little frosting on the cake. This evidence, we believe, would have moved the jury to convict Vasquez without a nudge from anything it heard in the government's rebuttal case.

For these reasons, the judgment of the district court is AFFIRMED.

HAMILTON, Circuit Judge, dissenting. I respectfully dissent. I agree with my colleagues that the district court did not abuse its discretion by allowing evidence of Vasquez's 2002 conviction, by allowing evidence found in the search of the automobile, or by limiting the cross-examination of Agent Chupik. I also agree that the district court's error in preventing the defendant from refreshing Agent Chupik's recollection was harm- less. However, I cannot agree that the MCC tapes were admissible or that the district court's errors in admitting the MCC tapes were harmless. I would reverse the conviction and remand for a new trial.

Marina Perez's second visit to the witness stand in the government's rebuttal case, to explore a phantom inconsistency and to admit erroneously the MCC tapes, caused unfair prejudice to the defendant. The jury heard evidence that the defendant's lawyer had advised him to plead guilty and had said that if the three defendants went to trial, "everyone is going to lose." That evidence had no genuine probative value, and it is difficult to imagine more prejudicial evidence. Even if a limiting instruction telling the jury that such damaging evidence should not be considered for the

truth of the matters asserted could have been effective, which I doubt, no instruction was given. The district court admitted the rebuttal evidence as proof of the truth of the matters asserted in the taped MCC telephone calls, which my colleagues and I all agree was an error.

The whole episode made for a fairly dramatic conclusion for the trial. The defense case concluded on a Thursday, and the trial recessed for the weekend. On Sunday, the government filed an emergency motion for a continuance to prepare a rebuttal case using the MCC tapes of Marina Perez's conversations with her husband. On Monday, the court allowed the delay and sent the jury home. Mrs. Perez was called to testify again on Tuesday. In her testimony, she admitted the key legitimate point that the government was entitled to make: that she expected or at least hoped that Vasquez's lawyer could help her husband receive a lighter sentence. But the government's rebuttal did not stop there. After Mrs. Perez testified, the government played the tapes through another witness. On Wednesday, after further drama, the case was given to the jury.3 Mrs. Perez's testimony and the government's attempted impeachment figured prominently in the government's closing argument to the jury. Then, after the jury had heard that Vasquez's attorney had told him to take a plea and that he was going to lose at

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1 The further drama included the government threatening Vasquez's lawyer with investigation and prosecution, Tr. 571, and the court holding Joel Perez in contempt of court because he refused to testify and telling him that he faced life in prison if he continued to refuse. Tr. 578-79. After that finding and threat, the government said: "I don't know if we need Mr. Perez still or not." Tr. 579. He did not testify.

trial, that same attorney rose, with his credibility destroyed, to give closing argument on Vasquez's behalf.

One theory for questioning Mrs. Perez about the MCC tapes and then admitting the tapes was that they were prior statements by Mrs. Perez that were inconsistent with her trial testimony for the defense. But inconsistent with what? Mrs. Perez testified that Vasquez drove to the site of the drug meeting because she asked him to pick up her husband with the Perez's car. Nothing in the MCC tapes is inconsistent with that testimony. The government's theory was that Mrs. Perez's belief that Vasquez would be convicted was inconsistent with her testimony that it was her fault that Vasquez happened upon the scene of the transaction. See Gov't Br. 18. The theory seems to be that if Mrs. Perez's trial testimony were honest, she necessarily would have believed that as long as she testified truthfully, the jury would unerringly find Vasquez not guilty. Because she was very worried that Vasquez would be convicted, goes the theory, the jury should conclude that she lied in her trial testimony.

That theory of the supposed inconsistency makes sense only if we assume that, if Mrs. Perez was telling the truth, she also must have had an extraordinary and even naive confidence in the infallibility of juries in telling the difference between true and false testimony. Any citizen who has followed recent news of exonerations of innocent but convicted defendants would be entitled to worry. One can be a great believer in the wisdom of juries, as I am, without assuming they are infallible. Let's assume for purposes of argument that Mrs. Perez's testimony about asking Vasquez to

drive the Perez's car to pick up her husband was true. Even so, anyone as familiar as she was with the evidence against both her husband and Vasquez—who were then both in the federal lock-up under federal indictment—could reasonably worry that she might not be believed. If a witness's expression of the view that a trial might come out the wrong way can be treated as inconsistent with the witness's testimony for the "right" result, we will see more cases with attempted impeachment like this.

I recognize that a prior statement need not be "diametrically opposed" with a witness's testimony to be inconsistent, but genuine inconsistency is still necessary. See *United States v. Hale*, 422 U.S. 171, 176 (1975); *United States v. Jones*, 808 F.2d 561, 568 (7th Cir. 1986); accord, *United States v. Cody*, 114 F.3d 772, 776-77 (8th Cir. 1997). The supposed inconsistency here was non-existent. It was an abuse of discretion to admit the evidence on that theory.[4]

The government's bias theory also does not justify admission of the MCC tapes. Evidence of a witness's bias is always relevant, of course. See, e.g., *United States v. Lindemann*, 85 F.3d 1232, 1243 (7th Cir.

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2 My colleagues also suggest that Mrs. Perez failed to disclose several meetings with Vasquez's lawyer when she testified in the defense case. Slip op. at 12-13. She testified about the only meeting she was asked about. Tr. 419. The fact that she had other meetings, which she was not asked about, was not inconsistent with her testimony. A witness should not be impeached for having failed to volunteer information not sought by the questioner. In fact, in a criminal trial, volunteered information often poses a greater danger to the fairness of the trial than omissions do.

1996). But the first problem here is that before the MCC tapes were admitted, Mrs. Perez had already admitted the asserted bias: she hoped that Vasquez's lawyer would help her husband receive a lower sentence. There was no need for further extrinsic evidence of the point, especially where that extrinsic evidence posed all the problems that the MCC tapes did here. In light of Mrs. Perez's candid (if perhaps naive) admission, the tapes provided no or little additional probative value, but caused substantial unfair prejudice to defendant Vasquez.

Neither theory of admission—prior inconsistent statements or evidence of bias—supported admission of the MCC tapes at all. My colleagues and I agree at least, however, that the district court erred in admitting the MCC tapes for the truth of the matters asserted by the speakers. Bias is not an exception to the hearsay rule, and even genuinely inconsistent statements are not admissible for the truth of the matters asserted. In this case, the tapes included hearsay, double hearsay, and even triple hearsay. In the most extraordinary and prejudicial example, the jury heard Joel Perez tell Marina Perez that Vasquez had told him that Vasquez's lawyer had told Vasquez that he should plead guilty:

> Marina: So what'd Beau [Vasquez's lawyer] tell him [Vasquez]? What did Beau tell him?
>
> Joel: A blind plea would be good, then he can guarantee this and that. You know what I mean? Just certain things, you know? I got to explain to you.

Marina: He's telling him about a blind plea also?

Joel: Yeah, he is. I gotta explain to you. You know what I mean. He says, if you want, have his wife talk to me, this or that. I have to explain to you tomorrow.

Supp. App. 13.[5] The jury also heard Marina Perez tell her husband that Vasquez's lawyer (who was his lead trial attorney) had told her that if the three defendants went to trial, "everybody is going to lose." Supp. App. 11. The government highlighted that comment in its questioning of Mrs. Perez. Tr. 528-29. The erroneous admission of this highly prejudicial hearsay and triple hearsay for the truth of the matters asserted should require a new trial.

My colleagues conclude, however, that the erroneous treatment of the MCC tapes evidence was harmless because the government had so much other evidence against Vasquez. I respectfully disagree. The issue is whether the reviewing court is "convinced that the jury would have convicted even absent the error." *United States v. Simmons*, 599 F.3d 777, 780 (7th Cir. 2010) (holding that arguable errors in admitting

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3 The government argues for a different interpretation, that Joel Perez was telling Marina that Vasquez's lawyer had told Joel that Joel should enter a blind guilty plea (i.e., a plea without an agreement). In context, the better reading, and certainly a permissible interpretation available to the jury, is that both Joel's lawyer and Vasquez's lawyer were telling their respective clients that they should enter blind guilty pleas. That explains Marina's "also," since Joel's lawyer was advising him at the time to enter a blind plea.

evidence were harmless in light of defendant's own admissions about his involvement in crime). The standard calls upon an appellate court not to "become in effect a second jury," see *Neder v. United States*, 527 U.S. 1, 19 (1999), but to determine "whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Id.* at 15, quoting *Chapman v. California*, 386 U.S. 18, 24 (1967). Accord, e.g., *United States v. McGowan*, 590 F.3d 446, 456 n.1 (7th Cir. 2009); *United States v. Williams*, 493 F.3d 763, 766 (7th Cir. 2007).

The standard is not easy to satisfy, and four factors here lead me to conclude this error was not harmless: the modest strength of the rest of the government's case against Vasquez, the prejudicial character of the evidence that was admitted erroneously, the fact that the jury acquitted Vasquez of one of two charges, and the importance that the government itself attributed to its flawed rebuttal evidence.

Looking first at the strength of the rest of the case, we can all agree that the government had a solid case against both Perez and Cruz. Both were recorded making arrangements for the cocaine purchase, and both showed up at the agreed time and place. The case against Vasquez was not as clear. Vasquez was not recorded at all. He was not even mentioned in any of the recorded calls. The agents, the confidential informant, and even Cruz were expecting only a single customer to show up for the meeting. They knew nothing about Vasquez until they saw him arrive in the Perez's car at the nearby Denny's parking lot, from where he could see Perez and Cruz. He never got out of the car, and

the agents did not hear him talk with anyone.

On the other hand, of course, Vasquez arrived at the scene of a planned drug meeting driving a car carrying $23,000 in a hidden compartment. He fled in the car, dramatically and dangerously, as the agents tried to make the arrests. He had previously been convicted of a drug deal with Perez using a car with a similar hidden compartment. And Cruz testified that he heard Vasquez tell Perez on the telephone: "tell him we got the money here."

Let's put aside the flight evidence for a moment and focus on the other evidence. Marina Perez's testimony provided an innocent explanation for Vasquez's presence on the scene in the car with the hidden money. She said she planned to pick up her husband but had an argument with him. She asked Vasquez to pick him up and to take the Perez's car because his own was parked in by that car. The credibility of her testimony is at least debatable. And Cruz, the co-defendant who set up the meeting with the informant, testified that Perez was not even supposed to bring any money to the meeting, Tr. 237- 38, which is at least consistent with her testimony.

Cruz's testimony about Vasquez's statement, "tell him we got the money here," was important. Apart from the flight evidence, it was the strongest evidence against Vasquez, and it was actually inconsistent with Marina Perez's testimony. My colleagues treat the statement as an undisputed fact, but that is a mistake when we are evaluating whether an error was harmless. The credibility of that key bit of testimony was subject to strong attacks, far stronger than the government's attacks on Mrs. Perez's testimony. Cruz

was a cooperating defendant with powerful incentives to help the government prove its case against Vasquez, the only one of the three who went to trial. On the witness stand, Cruz admitted having lied to the government about Vasquez and several other subjects. Tr. 250-52, 254-56, 268-72, 289. Most important, Cruz admitted that he first told the government about Vasquez's supposed "money" comment less than one week before trial. Tr. 263-64. By that time, Cruz had already been debriefed by the government several times, all without ever mentioning the single most damaging part of his testimony against Vasquez. On this record, the jury could easily have treated the "money" comment as a late and false invention by Cruz. The Rule 404(b) evidence—the prior conviction—was strong evidence, but it remained 404(b) evidence that could not make the case by itself.

Without the flight evidence and the MCC tapes erroneously admitted for their truth, then, the government had evidence that was legally sufficient to convict Vasquez, but the case was far from a slam-dunk. The dramatic evidence of the dangerous flight strengthened the case substantially and makes it easier for my colleagues to describe the district court's error as harmless. But the flight evidence cannot carry that much weight, in my view. The Supreme Court and we have repeatedly cautioned against too much reliance on flight as evidence of guilt for the crime charged because there are so many links in the chain of inferences:

We have long adhered to the Supreme Court's cautionary language urging courts to be wary of the probative value of flight evidence. See *Wong Sun v.*

United States, 371 U.S. 471, 483 n.10 (1963) ("[W]e have consistently doubted the probative value in criminal trials of evidence that the accused fled the scene of an actual or supposed crime."). While we allow evidence of flight to be presented, courts must engage in careful deliberation when considering its admission. Determination of the probative value of flight as evidence of a defendant's guilt depends on the degree of confidence with which four inferences can be drawn: (1) from behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged. See *United States v. Levine*, 5 F.3d 1100, 1107 (7th Cir. 1993); see also *United States v. Jackson*, 572 F.2d 636, 639 (7th Cir. 1978) (adopting this analysis as set forth in *United States v. Myers*, 550 F.2d 1036, 1049 (5th Cir. 1977)).

United States v. Robinson, 161 F.3d 463, 469 (7th Cir. 1998). If we follow that cautious approach to flight evidence, we should not rely on it to save the jury's verdict from the error we all agree was made in admitting the highly prejudicial evidence from the MCC tapes.

We must also consider the prejudicial effect of the improper evidence. The evidence from the MCC tapes, admitted here erroneously for their truth and with no true probative value, was just about as prejudicial as one could expect to encounter in a trial. The jury heard that Vasquez's lawyer—the man who would soon make a closing argument asking them to find reasonable doubt in the government's case—had told Vasquez that he should plead guilty and had said that if he and his

co- defendants went to trial, "everyone is going to lose." A juror who heard and believed that evidence would surely discount anything she heard from that lawyer. In terms of prejudice, these harpoons are com- parable to evidence of a defendant's own withdrawn guilty plea. Such a plea is virtually never admissible because of its powerful force. See Fed. R. Evid. 410(1); *Kercheval v. United States*, 274 U.S. 220, 223-24 (1927).

We also have strong indications from both the jury and the government itself that the erroneous admission of the MCC tapes was not harmless. Even with the prejudicial and erroneous evidence, the jury still found Vasquez not guilty on the charge of attempted possession with intent to distribute. That verdict is hard to reconcile with the jury's conviction on the conspiracy charge, and the split verdict certainly has the whiff of a compromise verdict in a close case. Such verdicts are permissible in criminal cases, of course, but when deter- mining whether, beyond a reasonable doubt, a conceded error was harmless, we should not ignore that strong signal that the jury viewed the case as a close one, even with the evidence of flight and the improper rebuttal evidence.

The government also showed how important it believed the improper rebuttal evidence was by its extra- ordinary efforts to obtain its admission. The trial seemed nearly over when the government filed its emergency Sunday motion for a continuance to enable it to prepare this rebuttal case. The events of the next several days, including especially the government's emphasis on the improper evidence in its closing argument, showed that the government believed that Mrs. Perez had seriously weakened its case and that

the improper rebuttal evidence strengthened its case considerably. My colleagues disagree with that assessment, but in applying the harmless error standard, we should give more weight to the views of the party who sought admission of the improper evidence, as shown by that party's conduct at trial.

I am not trying to suggest that Vasquez is actually innocent or that I necessarily believe Marina Perez's testimony about why he was in the car at the scene of the bust. Those are questions for the jury. But in light of the closeness of the case, the highly prejudicial nature of the improper evidence, the jury's split verdict, and the government's emphasis on the improper evidence, I am not convinced beyond a reasonable doubt that the jury would have convicted Vasquez in the absence of the improper and highly prejudicial MCC tape evidence. I would vacate the judgment and order a new trial.

3-14-11

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

May 10, 2011

Before
TERENCE T. EVANS, Circuit Judge
DIANE S. SYKES, Circuit Judge
DAVID F. HAMILTON, Circuit Judge

No. 09-4056
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
ALEXANDER VASQUEZ, JR.,
Defendant-Appellant.

Appeal from the United States
District Court for the Northern
District of Illinois, Eastern Division.
No. 1:08-cr-00625-3
Charles R. Norgle, Sr.,
Judge.

ORDER

On March 28, 2011, the defendant-appellant filed a petition for rehearing and for rehearing en banc. All of the judges on the panel have voted to deny rehearing, and no judge in active service has requested a vote on the petition for rehearing en banc. It is therefore ordered that the petition for rehearing and for rehearing en banc is DENIED.

OPPOSITION BRIEF

No. 11-199

In the Supreme Court of the United States

ALEXANDER VASQUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals applied the correct test for harmless error in concluding that the district court's erroneous admission of certain hearsay was harmless.

2. Whether the application of harmless-error analysis violated petitioner's Sixth Amendment right to a jury trial.

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In the Supreme Court of the United States

No. 11-199

ALEXANDER VASQUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1A-28A) is reported at 635 F.3d 889.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 2011. A petition for rehearing was denied on May 10, 2011 (Pet. App. 29A). The petition for a writ of certiorari was filed on August 8, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on one count of conspiring to possess more than 500 grams of cocaine with intent to distribute,

in violation of 21 U.S.C. 846. He was sentenced to 240 months in prison, to be followed by eight years of supervised release. The court of appeals affirmed. Pet. App. 1A-28A.

1. Petitioner was apprehended after a dramatic flight from police in Arlington Heights, Illinois, following an aborted drug deal. Pet. App. 2A-3A. The evidence at trial showed that petitioner's co-defendants, Joel Perez and Carlos Cruz, sought to purchase a kilogram of cocaine. *Id.* at 2A. To arrange the deal, Cruz contacted a cocaine trafficker named Alejandro Diaz, who was cooperating with the government. *Ibid.* They agreed to meet at a gas station in Arlington Heights. *Ibid.*

On the appointed date, Cruz and Perez drove to the gas station. Pet. App. 2A. There, they met Diaz, who directed them to follow him to another location. *Ibid.* Instead, Perez walked to a nearby parking lot, where petitioner was waiting for him in the driver's seat of Perez's black Bonneville. *Ibid.* From the passenger seat of the car, Perez called Cruz, telling him that he was unwilling to follow Diaz. *Ibid.* Cruz then walked over to join the pair at the Bonneville, where Perez introduced him to petitioner. *Ibid.* When Diaz called to inquire why they were not following him, Cruz replied that Perez wanted to complete the deal in the parking lot. *Ibid.* Perez told Cruz to say that "we got the money here." *Ibid.* Petitioner repeated this statement: "[T]ell him we got the money here." *Id.* at 2A-3A. Cruz hung up with the understanding that Diaz would return to complete the deal. *Id.* at 3A.

Diaz contacted his handler. Pet. App. 3A. Law enforcement agents surrounded the parking lot and then approached the Bonneville by car and on foot. *Ibid.* The

officers used their lights and sirens. Gov't C.A. Br. 7. Cruz, who was standing outside of the Bonneville, surrendered. Pet. App. 3A. Petitioner did not. Instead, with Perez in the passenger seat, petitioner threw the Bonneville in reverse and accelerated, striking two Arlington Heights police cars. *Ibid.* He then shifted gears and sped toward the parking lot exit. *Ibid.* A DEA agent stood in the path of the Bonneville, pointed his gun at petitioner, and commanded him to stop. *Ibid.* Petitioner did not slow down, however, and the agent was forced to leap out of the way. *Ibid.* Petitioner sped out of the parking lot and turned west into the eastbound lanes of the adjoining road, swerving between oncoming cars. *Ibid.*; Gov't C.A. Br. 8.

A few minutes later, police found the Bonneville abandoned in a parking lot. Pet. App. 3A. A bystander told police that he had seen two men run from the car toward a nearby McDonald's. *Ibid.* An Arlington Heights detective pursued the pair and spotted petitioner through the window of the restaurant; petitioner briefly locked eyes with the detective, then turned and ran. *Ibid.*; Gov't C.A. Br. 8. The detective chased the men through the kitchen of the restaurant and out the back door. Pet. App. 3A. Perez and petitioner then split up and fled in different directions, but both were soon apprehended. *Ibid.*

The police found a cell phone on petitioner and two cell phones on the ground near Perez. Pet. App. 3A. Phone records indicated that petitioner had called Perez's phones on the day before and on the day of the planned drug transaction. *Id.* at 3A-4A. A search of the Bonneville revealed a hidden compartment containing $23,000 in cash. *Id.* at 4A.

2. A federal grand jury indicted petitioner on one count of conspiring to possess with intent to distribute more than 500 grams of cocaine and on one count of attempting to possess with intent to distribute more than 500 grams of cocaine. Pet. App. 4A. Perez and Cruz were also indicted on drug charges and pleaded guilty. *Id.* at 10A. Petitioner elected to go to trial. The theory of petitioner's defense was that he was "an innocent bystander who just happened to be in the wrong place at the wrong time." *Id.* at 11A. The government countered this defense by introducing, under Federal Rule of Evidence 404(b), evidence of petitioner's prior conviction for a cocaine offense in which, as here, petitioner "carried out a cocaine deal with Perez using a hidden compartment in a car." *Id.* at 6A. The district court granted the government's motion to admit the evidence under Rule 404(b) "to show [petitioner's] knowledge, intent, absence of mistake and modus operandi." *Id.* at 7A.

Petitioner called as a witness Perez's wife, Marina, to establish that he lacked knowledge that a drug deal was to take place. Pet. App. 11A. Marina testified that her husband had asked her to pick him up at the location of the planned drug deal, but that she had asked petitioner to go in her place. *Ibid.* Petitioner took the Bonneville rather than his own car, Marina explained, because it was more convenient for him to do so. *Ibid.* Marina also testified that she had met petitioner's lawyer once before the trial. See *id.* at 12A.

After Marina's testimony, the district court granted the government a short continuance for the purpose of examining recordings the government had obtained of telephone conversations between Marina and Perez, who was incarcerated at the time. Pet. App. 12A. When the trial resumed, the government called Marina as a rebut-

tal witness to establish her bias. *Ibid.* Marina admitted that she had met with petitioner's lawyer several times in addition to the only meeting she mentioned in her direct testimony. *Ibid.* She also acknowledged her belief that petitioner's lawyer was going to assist in obtaining a lower sentence for her husband, Perez, and that petitioner's lawyer wanted Perez to enter a plea and thereby avoid implicating petitioner. *Ibid.* The government then introduced the recorded telephone conversations. In the recordings, Perez told Marina that petitioner's lawyer had told petitioner that he should plead guilty and that if both he and his co-defendants went to trial, "everybody is going to lose." *Id.* at 12A-13A.

After requesting the transcript of Marina's testimony during its deliberations, see Pet. 8, the jury found petitioner guilty on the conspiracy charge but acquitted him on the attempt charge. Pet. App. 5A. The district court sentenced petitioner to serve 240 months in prison. *Id.* at 1A.

3. The court of appeals affirmed. Pet. App. 1A-17A. Petitioner's principal argument on appeal was that the district court had erred in permitting the government to call Marina as a rebuttal witness and in admitting the recordings over his objection. See *id.* at 10A. Although the court of appeals rejected most of petitioner's arguments, *id.* at 13A-15A, it agreed with petitioner that the district court had improperly admitted the recordings for their truth, *id.* at 15A. The court concluded, however, that the error was harmless. *Id.* at 15A-17A.

The court of appeals explained that whether an error is harmless depends on "whether, in the mind of the average juror, the prosecution's case would have been 'significantly less persuasive' had the improper evidence been excluded.'" Pet. App. 16A (quoting *United States*

v. *Emerson*, 501 F.3d 804, 813 (7th Cir. 2007)). The court added that "the burden lies on the government" to show that "a reasonable jury would have reached the same verdict without the challenged evidence." *Ibid.* (citing *United States* v. *Williams*, 493 F.3d 763, 766 (7th Cir.), cert. denied, 552 U.S. 984 (2007)).

Although it described the issue as "close," the court concluded that the error was harmless in light of "the evidence as a whole." Pet. App. 16A. In particular, the court cited petitioner's flight from police as powerful evidence of guilt. The court acknowledged that flight evidence "must be viewed with caution," but stressed that "there are degrees of flight," and "what happened here [was] flight in the first degree." *Ibid.* (citation omitted). "How else do you describe throwing the Bonneville into reverse, endangering officers * * * , hitting two police squad cards, and gunning it the wrong way into a roadway from the parking lot, ditching the car a few moments later and trying to escape by running through the kitchen and out the back door of a McDonald's?" *Ibid.* In addition, the court pointed to petitioner's statement to Cruz that "we got the money here"; cell phone records showing multiple contacts between petitioner and Cruz leading up to the failed transaction; the $23,000 in cash hidden in the car that petitioner was driving; and the "striking similarity" between this foiled scheme and petitioner's previous conviction for a drug offense that likewise involved Perez, a cocaine deal, and cash hidden in a car. *Id.* at 16A-17A; see also *id.* at 5A-7A (rejecting petitioner's challenge to the admission of his prior conviction under Rule 404(b)).

Judge Hamilton dissented. Pet. App. 17A-28A. In his view, the admission of the telephone recordings was not harmless. He agreed with the majority that the test

for harmlessness is whether the reviewing court is "'convinced that the jury would have convicted even absent the error.'" *Id.* at 22A (quoting *United States* v. *Simmons*, 599 F.3d 777, 780 (7th Cir. 2010)). The dissent stated that this standard requires the court to determine "'whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Id.* at 23A (quoting *Neder* v. *United States*, 527 U.S. 1, 15 (1999)). In the dissent's view, that standard was not satisfied here because the government's case against petitioner was "far from a slam-dunk," *id.* at 25A, and the evidence from the recordings was "just about as prejudicial as one could expect to encounter in a trial," *id.* at 26A. Moreover, the dissent reasoned, the government emphasized the rebuttal evidence in its closing, *id.* at 27A, and the jury must have viewed the case as a close one, having acquitted petitioner on the charge of attempted possession with intent to distribute, *ibid.* In light of these factors, Judge Hamilton was "not convinced beyond a reasonable doubt that the jury would have convicted [petitioner] in the absence" of the erroneously admitted evidence. *Id.* at 28A.

ARGUMENT

Petitioner contends that the court of appeals applied the wrong standard for harmless-error review in upholding his conviction and that its decision implicates a circuit conflict on whether the impact of an error on the jury, as well as the strength of the government's evidence, is relevant to harmless-error analysis. The court of appeals concluded that an evidentiary error in petitioner's trial was harmless because, in light of the strength of the government's case, "a reasonable jury would have reached the same verdict without the chal-

lenged evidence." Pet. App. 16A. That approach does not conflict with any decision of this Court or that of any other court of appeals, and it does not warrant further review.

1. Rule 52(a) of the Federal Rules of Criminal Procedure provides that "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." This Court has repeatedly made clear that an error may be harmless under Rule 52(a) where the evidence of guilt is so strong that "the jury verdict would have been the same absent the error." *Neder* v. *United States*, 527 U.S. 1, 17 (1999); see, *e.g.*, *Schneble* v. *Florida*, 405 U.S. 427, 430 (1972); *Harrington* v. *California*, 395 U.S. 250, 254 (1969). The court of appeals applied that standard here. See Pet. App. 16A (whether the jury "would have reached the same verdict without the challenged evidence").

Petitioner emphasizes (Pet. 21-23) that this Court has alternatively articulated the harmless-error standard as whether the error in question "contributed to the conviction." *Chapman* v. *California*, 386 U.S. 18, 23 (1967) (citation omitted); see also *Fahy* v. *Connecticut*, 375 U.S. 85, 86-87 (1963) (same); *Kotteakos* v. *United States*, 328 U.S. 750, 764 (1946) (asking what "effect" or "impact" the error had on the verdict). But that formulation is just another way of asking whether a rational jury "would have reached the same verdict without the challenged evidence," the formulation the court of appeals employed here. Pet. App. 16A. For if the properly admitted evidence of guilt is so compelling that "a rational jury would have found the defendant guilty absent the error," *Neder*, 527 U.S. at 18, then the error cannot be said to have "contributed to the conviction," *Chapman*, 386 U.S. at 23 (citation omitted).

This Court has consistently treated the two formulations as equivalent. Thus, in *Neder*, the Court held that a district court's failure to instruct the jury on materiality in a criminal fraud case was harmless error in light of "overwhelming evidence, such that the jury verdict would have been the same absent the error." 527 U.S. at 17. The Court then added: "We think it beyond cavil that the error 'did not contribute to the verdict obtained.'" *Ibid.* (quoting *Chapman*, 386 U.S. at 24). Likewise, in *Harrington*, the Court held that a violation of the defendant's rights under the Confrontation Clause was "harmless error under the rule of *Chapman*" because the evidence against the defendant was "overwhelming." 395 U.S. at 253, 254. And in *Delaware* v. *Van Arsdall*, 475 U.S. 673 (1986), the Court cited *Harrington* and *Schneble* as examples of cases in which the *Chapman* standard had been applied. See *id.* at 680. The Seventh Circuit has likewise used both formulations. Compare, *e.g.*, Pet. App. 16A and *United States* v. *Glosser*, 623 F.3d 413, 419 (7th Cir. 2010) ("would have been the same"), with *United States* v. *Foster*, No. 10-3198, 2011 WL 2909455, at *8 (7th Cir. July 21, 2011) ("effect on the jury's verdict").

The overall strength of the government's case is not always the only factor in the harmless-error analysis. For example, where, as in *Van Arsdall*, the error in question consists of an improper restriction on cross-examination of a government witness, a reviewing court may find the error to require reversal notwithstanding the overall strength of the government's proof because the restriction may have prevented the defense from effectively undercutting that proof. In such a case, the court may appropriately consider such factors as the importance of the witness's testimony, whether the testi-

mony was cumulative, the presence or absence of corroborating or contradicting testimony, and the extent of cross-examination otherwise permitted, as well as the overall strength of the government's case. See *Van Arsdall*, 475 U.S. at 684. But in a case such as this, in which there is no claim that the defendant was prevented from challenging the government's proof and the court finds that the government's overall case was so strong that the jury verdict would have been the same without the challenged evidence, the harmless-error inquiry is complete.

Sullivan v. *Louisiana*, 508 U.S. 275 (1993), on which petitioner relies (Pet. 24), is not to the contrary. There, the district court gave a defective "reasonable doubt" instruction. This Court held that the error was not subject to harmless-error analysis because it "vitiates *all* the jury's findings," 508 U.S. at 281, and produces "consequences that are necessarily unquantifiable and indeterminate," *id.* at 282. In so doing, the Court stated that the appropriate harmless-error inquiry "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury trial guarantee." *Id.* at 279. But while in *Sullivan* a verdict of guilt beyond a reasonable doubt was never rendered because of the defective "reasonable doubt" instruction, in this case such a verdict *was* rendered, so the court of appeals did not have to "hypothesize a guilty verdict." In any event, this Court made clear in *Neder* that the above "strand of the reasoning" in *Sullivan* no longer

has force because it "cannot be squared with our harmless-error cases." 527 U.S. at 11.

In short, the court of appeals properly looked to the strength of the government's case against petitioner in determining that the district court's error was harmless. The court did not suggest that other considerations are irrelevant under Rule 52(a). Indeed, the Seventh Circuit has explicitly considered other factors in the harmless-error analysis in appropriate cases. See, *e.g.*, *United States* v. *Boling*, 648 F.3d 474, 481 (2011); *United States* v. *Lee*, 558 F.3d 638, 649 (2009); *United States* v. *Parr*, 545 F.3d 491, 502 (2008), cert. denied, 129 S. Ct. 1984 (2009). Rather, the court simply held that the overall strength of the government's proof in *this* case was enough to establish that the improper admission of the recordings was harmless. See Pet. App. 16A-17A. That fact-bound conclusion does not warrant this Court's review.

2. Petitioner's survey of the law in other courts of appeals (Pet. 17-20) does not aid his cause. Although the courts of appeals, like this Court, have used a variety of verbal formulations to describe the harmless-error inquiry, none has concluded that the strength of the government's case can never by itself establish the harmlessness of an evidentiary error. To the contrary, *every* regional court of appeals, like the court below, has repeatedly found errors to be harmless based on that factor alone. There is consequently no reason to believe that the outcome of petitioner's appeal would have been different in another circuit.

For example, petitioner highlights (Pet. 15) the Second Circuit's statement in *Wray* v. *Johnson*, 202 F.3d 515 (1998), that in harmless-error analysis a reviewing court must consider the importance of the wrongly ad-

mitted testimony as well as the overall strength of the prosecution's case. But here the court *did* consider the impact of the improperly admitted evidence in relation to the strength of the government's overall case. See Pet. App. 17A (concluding that the evidence of petitioner's guilt "would have moved the jury to convict [petitioner] without a nudge from anything it heard in the government's rebuttal case"). And in any event, a determination that the jury would have reached the same verdict absent the error constitutes an implicit determination that the error was not important enough in relation to the government's proof to affect the outcome. See p. 8, *supra*. The Second Circuit has made clear that the strength of the government's case is "the most critical factor" in the harmless-error analysis, see *United States* v. *Curley*, 639 F.3d 50, 58 (2d Cir. 2011) (citation omitted), and it has repeatedly found errors to be harmless based on that factor alone, see, *e.g.*, *United States* v. *Gabayzadeh*, No. 06-5466-cr, 2011 WL 2519539, at *2 (2d Cir. June 27, 2011); *United States* v. *Nicolo*, 421 Fed. Appx. 57, 67-68 (2d Cir.), cert. denied, No. 11-5662 (Oct. 3, 2011); *United States* v. *Jass*, 569 F.3d 47, 64-65 (2d Cir. 2009), cert. denied, 130 S. Ct. 2128 (2010); *United States* v. *Paulino*, 445 F.3d 211, 219 (2d Cir.), cert. denied, 549 U.S. 980 (2006).

Similarly, petitioner cites (Pet. 17, 19) cases from the Third and Eighth Circuits examining factors in addition to the strength of the government's proof in determining whether an improper reference to the defendant's exercise of his right to remain silent was harmless. See *Virgin Islands* v. *Martinez*, 620 F.3d 321, 338 (3d Cir. 2010), cert. denied, 131 S.Ct. 1489 (2011); *United States* v. *Martin*, 391 F.3d 949, 955 (8th Cir. 2004). In other contexts, however, both of those courts have routinely

found errors to be harmless based solely on the strength of the government's case. See, *e.g.*, *United States* v. *Christie*, 624 F.3d 558, 571, 572 (3d Cir. 2010), cert. denied, 131 S. Ct. 1513 (2011); *United States* v. *Shabazz*, 564 F.3d 280, 286 (3d Cir. 2009); *United States* v. *Price*, 13 F.3d 711, 720 (3d Cir.), cert. denied, 512 U.S. 1241 (1994); *United States* v. *Watson*, No. 11-1169, 2011 WL 3568918, at *3 (8th Cir. Aug. 16, 2011); *United States* v. *Gregoire*, 638 F.3d 962, 969 (8th Cir. 2011); *United States* v. *Samuels*, 611 F.3d 914, 919 (8th Cir. 2010), cert. denied, 131 S. Ct. 1583 (2011). For the same reason, petitioner's discussion of cases selected from the Fourth, Sixth, Ninth, Tenth, and D.C. Circuits is likewise unpersuasive. See Pet. 17-20. Each of those courts, like the court of appeals below, has repeatedly held errors harmless based solely on the overwhelming nature of the government's proof.[1]

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[1] See, *e.g.*, *United States* v. *Blauvelt*, 638 F.3d 281, 290-291 (4th Cir.), cert. denied, No. 10-1473 (Oct. 3, 2011); *United States* v. *Cole*, 631 F.3d 146, 154-155 (4th Cir. 2011); *United States* v. *Hardy*, 643 F.3d 143, 153-154 (6th Cir.), petition for cert. pending, No. 11-6002 (filed Aug. 16, 2011); *United States* v. *Martinez*, 588 F.3d 301, 313 (6th Cir. 2009), cert. denied, 131 S. Ct. 538 (2010); *United States* v. *Cardenas-Mendoza*, 579 F.3d 1024, 1032-1033 (9th Cir. 2009); *United States* v. *Thongsy*, 577 F.3d 1036, 1043 (9th Cir. 2009); *United States* v. *Edwards*, 540 F.3d 1156, 1164 (10th Cir. 2008), cert. denied, 129 S. Ct. 964 (2009); *United States* v. *Sarracino*, 340 F.3d 1148, 1164 (10th Cir. 2003), cert. denied, 540 U.S. 1131 (2004); *United States* v. *Ginyard*, 444 F.3d 648, 655-656 (D.C. Cir. 2006); *United States* v. *Kayode*, 254 F.3d 204, 212 (D.C. Cir. 2001), cert. denied, 534 U.S. 1147 (2002).

Although petitioner does not mention the First, Fifth, and Eleventh Circuits, the same practice prevails in those courts as well. See, *e.g.*, *United States* v. *Rivera-Rodriguez*, 617 F.3d 581, 595 (1st Cir. 2010), cert. denied, 131 S. Ct. 960 (2011); *United States* v. *Hicks*, 575 F.3d 130, 143 (1st Cir.), cert. denied, 130 S. Ct. 647 (2009); *United States* v. *Diaz*, 637 F.3d 592, 600 (5th Cir.), cert. denied, No. 11-5111 (Oct. 3, 2011);

There is consequently no substance to petitioner's claim that the "weight of the circuit authority embraces the view" that overwhelming evidence of guilt "cannot be the sole focus of the harmless error inquiry." Pet. 20. In fact, every circuit has recognized the commonsense proposition that, even in cases of constitutional error (which the error here was not), the amount and persuasive force of the evidence properly admitted against a defendant may lead a reviewing court to conclude "beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Neder*, 527 U.S. at 18. Consistent with that settled approach, the court of appeals here properly concluded that the evidence of guilt "would have moved the jury to convict" petitioner regardless of the district court's error. Pet. App. 17A. Further review is not warranted.

3. Petitioner additionally contends (Pet. 32-33) that the court of appeals' harmless-error determination amounted to a denial of his constitutional right to a trial by jury. Petitioner principally relies for this argument on this Court's suggestion in *Sullivan* that for a reviewing court "to hypothesize a guilty verdict that was never in fact rendered" would violate "the jury trial guarantee." 508 U.S. at 279. As this Court subsequently explained in *Neder*, however, that "strand of the reasoning" from *Sullivan* has no independent force because it "cannot be squared with our harmless-error cases." 527 U.S. at 11; see pp. 10-11, *supra*. And in any event, the court of appeals here did not "hypothesize a guilty ver-

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United States v. *Rice*, 607 F.3d 133, 140-141 (5th Cir.), cert. denied, 131 S. Ct. 356 (2010); *United States* v. *Phaknikone*, 605 F.3d 1099, 1109-1110 (11th Cir.), cert. denied, 131 S. Ct. 643 (2010); *United States* v. *Street*, 472 F.3d 1298, 1315-1316 (11th Cir. 2006), cert. denied, 551 U.S. 1138 (2007).

dict that was never in fact rendered," but instead concluded that the jury's *actual* verdict would not have been different without the erroneously admitted evidence—the very inquiry that the Court in *Sullivan* concluded was required. Compare *Sullivan*, 508 U.S. at 280 (describing the correct inquiry as whether "the jury's actual finding of guilty beyond a reasonable doubt *would surely not have been different* absent" the error), with Pet. App. 17A (concluding that the properly admitted evidence in the record "would have moved the jury to convict [petitioner] without a nudge from anything it heard in the government's rebuttal case").

4. Finally, petitioner argues (Pet. 26-32) that the outcome would have been different in this case if the court of appeals had considered in its harmless-error analysis such factors as the prejudicial nature of the telephone recordings; the district court's failure to give a limiting instruction; the jury's request for a transcript of Marina Perez's testimony; and the jury's rendering of a split verdict. But once the court of appeals decided that the jury would have reached the same verdict regardless of the error in light of the strength of the properly admitted evidence, it made no difference how prejudicial the recordings may have been (Pet. 16) or that the district court failed to give a proper limiting instruction (Pet. 28). Indeed, this Court has held that even the erroneous admission of a defendant's confession—the "most probative and damaging evidence" that a defendant can face, *Cruz* v. *New York*, 481 U.S. 186, 195 (1987) (White, J., dissenting) (citation omitted)—can be harmless error in light of "the remainder of the evidence

against the defendant," *Arizona* v. *Fulminante*, 499 U.S. 279, 310 (1991).[2]

Neither the jury's request for the transcript of Marina Perez's testimony nor its return of a split verdict suggests that the jury would not have reached the same verdict without the recordings. Marina Perez's testimony was the basis of petitioner's affirmative defense that he was simply an innocent bystander. See Pet. App. 11A ("She was his only hope, and a slim one at that."). That the jury wanted to review her testimony before rendering its verdict is therefore unremarkable. And the most likely explanation for the split verdict is that, while the jury believed that the evidence established beyond a reasonable doubt that petitioner had conspired with Perez and Cruz to engage in the cocaine transaction, it did not believe that he proceeded far enough in consummating that transaction to be guilty of attempt. That explanation is particularly plausible given that petitioner and Perez refused to follow Diaz as instructed to complete the cocaine deal. In any event, petitioner's fact-specific arguments concerning the court of appeals' harmless-error analysis in this case do not warrant this Court's review.[3]

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[2] Petitioner observes (Pet. 29) that, on the facts in *Fulminante*, the Court held that the erroneous admission of the defendant's confession was not harmless even though the defendant's second confession to another person had been properly admitted. But the Court in *Fulminante* found that the jury's assessment of the admissible confession "could easily have depended" on the corroborating fact of the prior, inadmissible confession, 499 U.S. at 297-299, and it stressed that, apart from the confessions, the prosecution's evidence was likely "insufficient to convict," *id.* at 297.

[3] Petitioner argues (Pet. 26) that the court of appeals accorded excessive weight to his attempted flight. That fact-bound question does not merit this Court's review. In any event, it was entirely appropriate for

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General
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OCTOBER 2011

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the court of appeals to give weight to that evidence in its harmless-error analysis. It is true that this Court has expressed doubt about the probative value of flight evidence, see *Wong Sun* v. *United States*, 371 U.S. 471, 483 n.10 (1963), and the court of appeals here recognized as much, acknowledging that flight evidence must be viewed "with caution." Pet. App. 16A. As the court explained, however, "there are degrees of flight," and "what happened here [was] flight in the first degree." *Ibid.* "How else do you describe throwing the Bonneville into reverse, endangering officers * * * , hitting two police squad cards, and gunning it the wrong way into a roadway from the parking lot, ditching the car a few moments later and trying to escape by running through the kitchen and out the back door of a McDonald's?" *Ibid.* In *Wong Sun*, by contrast, the "flight" consisted merely of a defendant's running down the hall of his laundry establishment when the supposed customer at the door revealed that he was a narcotics agent. 371 U.S. at 482. The court of appeals did not err in concluding that, together with the other proof of guilt (as well as the Rule 404(b) evidence that impeached petitioner's only affirmative defense), petitioner's dramatic and violent flight from police supported the court's harmless-error determination.

REPLY BRIEF

NO. 11-199

IN THE SUPREME COURT
OF THE UNITED STATES

ALEXANDER VASQUEZ,

Petitioner,

- v -

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT

The Government's argument against granting the petition in this matter is two-fold: First, the Government argues that this Court's precedent and the precedent in the Circuit Courts of Appeals are entirely consistent on the issue of the appropriate mode of harmless-error analysis. Resp. 8-9. Second, the Government argues that the Seventh Circuit's decision below does not implicate the Sixth Amendment right to trial by jury. Resp. 14-15. Neither is accurate.

I. There is Significant Discord Both Between and Within the Circuit Courts of Appeals Over the Proper Mode of Harmless Error Analysis.

The Government acknowledges that this Court has "alternatively articulated the harmless-error standard." Resp. 8. It further concedes that the Courts of Appeals "have used a variety of verbal formulations to describe the harmless-error inquiry." Resp. 11. But, according to the Government, these variations and alternatives are mere distinctions without a difference.

Contrary to the Government's attempt to minimize the confusion surrounding the proper mode of analysis, petitioner is not alone in his characterization of the state of the law. As noted in the original petition, there is a wealth of support for the position that two different standards have developed, not only in secondary sources, but also in circuit court opinions throughout the country. See Pet. 13-14.

One of the Government's own arguments demonstrates the confusion. According to the Government, there is universal agreement that a court may focus solely on the overwhelming weight of the evidence to find an error harmless. Yet, the Government acknowledges that "[t]he overall strength of the Government's case is not always the only factor in the harmless-error analysis." Resp. 9. In Confrontation Clause cases dealing with limitations on cross-examination, the Government would allow courts to "appropriately consider such factors as the importance of the witness's testimony, whether the testimony was cumulative, the presence or absence of corroborating or contradicting testimony, and the extent of cross-examination otherwise permitted." Resp. 9-10.

This idea is culled from *Delaware v. Van Ardsall*, but has never been limited to the context of limitations on cross-examination. 475 U.S. 673 (1986) In fact, this Court has cited *Van Ardsall* in several cases outside the realm of Sixth Amendment violations. In *Neder v. United States*, a case the Government relies on extensively, the Court held that "the harmless-error inquiry must be essentially the same" for confrontation cases like *Van Ardsall*, cases dealing with "[t]he erroneous admission of evidence," and cases involving the omission of an element from a jury instruction. 527 U.S. 1, 18 (1999). This Court has never indicated that it created a different harmless error test only for Confrontation Clause violations. The Government's observations about *Van Ardsall*, then, are not based on any substantive difference in the law, but instead are a symptom of the same confusion noted by scholars and courts for decades. Thus, this is an area where this

Court's clear guidance is necessary.

In his original petition, petitioner noted several circuits that had rejected the idea of focusing the harmlessness inquiry solely on the weight of the evidence. According to the Government, these same circuits have "routinely found errors to be harmless based solely on the strength of the evidence." Resp. 13. As petitioner argued in his original petition, the conflicts in the modes of analysis exist both within and between the different Circuit Courts of Appeals. The fact that, even with in a single circuit, courts apply different tests aggravates the problem as opposed to diffusing it.

Many of the cases the Government cites as relying solely on the strength of the Government's evidence fall into one of two categories: (1) cursory dispositions that amount to alternative holdings; and (2) cases that actually assist in demonstrating the confusion. For better or worse, it has become the practice of many circuit courts of appeals to explore whether an error occurred, determine that it did not occur, and then hold that, alternatively, any such error was harmless. When this happens, courts rarely devote any significant time to the issue of harmlessness. Whether or not such a practice is appropriate is an issue for another day (or petition). The fact that, in some cases, with little discussion, courts have found errors to be harmless focusing on overwhelming evidence does not mean that it is appropriate to do so in every case regardless of the circumstances, especially not in a case like this one where even the majority referred to it as a "close" case. Pet. App. 16A.

These cases where the harmless error decision, a decision which ultimately decides whether a defendant's rights will be vindicated or sacrificed, is made in a few short sentences with a vague reference to overwhelming evidence demonstrate the need for clear, consistent guidance on the proper analysis.

This practice exists in every circuit addressed by the Government, but the first case cited by the Government as an example demonstrates the point. The Government points to *United States v. Gabayzadeh* as an example of a case where that court found an error harmless based solely on the weight of the evidence. No. 06-5466-cr, 2011 WL 2519539 (2d Cir. June 27, 2011). However, the Court in *Gabayzadeh* actually found that there was no error, but noted that "in any event" the error was harmless due to the overwhelming evidence of guilt. *Id.* This alleged harmless error analysis was accomplished in one sentence after the court had already determined that no error occurred. Many of the Government's cited cases are nearly identical.[1]

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1 See *United States v. Rivera-Rodriguez*, 617 F.3d 581, 595 (1st Cir. 2010) (issuing a conditional, cursory harmless-error ruling: "[e]ven if the district court abused its discretion here, which we seriously doubt, any purported error was harmless in light of the other overwhelming evidence against Muñiz-Massa"); *United States v. Paulino*, 445 F.3d 211, 219 (2d Cir. 2006) (same: "even if we were to conclude that Adolfo Paulino's statements had not been sufficiently probative to warrant admission as non-hearsay evidence, Christian Paulino would not be entitled to reversal of his conviction because any

An exhaustive analysis of every case the Government cites for this position is unnecessary and impractical at this point in the litigation. The fact that these cursory dispositions appear to run contrary to the many cases which explicitly reject the idea that a harmlessness finding can be based solely on a look at the strength of the Government's untainted evidence only highlights the need for clarification on this vital issue. See *Gov't of the V.I. v. Martinez*, 620 F.3d 321,

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such evidentiary error would properly be deemed harmless"); *United States v. Gregoire*, 638 F.3d 962 (8th Cir. 2011) (same: "the district court did not abuse its discretion . . . . Moreover, given the overwhelming evidence . . . we agree with the Government that any instruction error as to count 1 was harmless"); *United States v. Ginyard*, 44 F.3d 648 (D.C. Cir. 2006) (same: "[i]n light of the remand, we do not address appellants' other challenges to their convictions, except to note, given the likelihood of a new trial, that any error in admitting prior crimes evidence under Federal Rule of Evidence 404(b) was harmless in light of the overwhelming nature of the Government's evidence"); *United States v. Hicks*, 575 F.3d 130 (1st Cir. 2009) (same: "Even if there was an error in the admission of the three prior felony convictions (and a majority of the panel does not suggest that there was), that error was harmless in light of the other overwhelming evidence against appellant"); *United States v. Diaz*, 637 F.3d 592 (5th Cir. 2011) (same: "Agent De La Cruz's testimony was admissible opinion testimony under Federal Rule of Evidence 701. Even if the district court did err in some way, though, it was a harmless error in light of the remaining overwhelming evidence").

337 (3d Cir. 2010) (holding that "the relevant question . . . is not whether in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error"); *Wilson v. Mitchell*, 498 F.3d 491, 504 (6th Cir. 2007) (noting that the proper analysis looks to "whether the error had an actual impact on the verdict . . . and not . . . whether a hypothetical new trial would likely produce the same result).

Several of the cases the Government cites do not support its argument at all. Another case the Government claims as an example of a court finding harmless error solely on the strength of the Government's case is *United States v. Price*, 13 F.3d 711 (1994). However, that case demonstrates the importance of looking to factors that reveal the jurors actual thought process, as opposed to hypothesizing based upon the courts view of the weight of the evidence. *Id.* In *Price*, the Third Circuit explicitly relied upon the fact that the jury returned a split verdict in finding that an error was not harmless:

> Although, of course, a jury may return inconsistent verdicts, the jury's acquittal of Williams on the substantive count of selling cocaine to Mead, despite Mead's explicit testimony to the contrary, suggests that the jury found the Government's case through Mead's testimony was not totally persuasive.

Id. at 730. Similarly, *United States v. Cole*, another case the Government cites as looking only to the weight

of the evidence, explicitly explored the implications of the fact that the defendant was acquitted on three of the charges. 631 F.3d 146, 155 (4th Cir. 2011).

The Government cites *United States v. Christie*, as another example of a court relying solely on overwhelming evidence. 624 F.3d 558 (3d Cir. 2010). But *Christie* does not and cannot stand for that proposition. In *Christie*, the Third Circuit explicitly focused on the effect of the error, noting that the inadmissible testimony "span[ed] only fifteen lines in the transcript of an eight day trial." *Id.* at 571. The Court also noted that the testimony was "not mentioned in the Government's closing." *Id.* Thus, *Christie* falls in the category of cases analyzing the effect of the error, not cases relying solely on the weight of untainted evidence.

II. Whether an Improper Harmless Error Analysis Focusing Exclusively on Overwhelming Evidence of Guilt Implicates the Sixth Amendment Right to a Jury Trial is an Open Question.

The Government contends that the argument that a hypothesized jury verdict would violate the jury trial guarantee was put to rest in *Neder*. The Government points to language in *Neder*, which held that a jury instruction that omits an element is still subject to harmless error analysis. 527 U.S. at 15. To be sure, the Court did appear step back from some of the language in *Sullivan*. *Id.* However, the Court reaffirmed that an improperly conducted harmless error inquiry could implicate the Sixth Amendment:

"safeguarding the jury trial guarantee will often require that a reviewing court conduct a thorough examination of the record." *Id.* at 19.

This case presents an entirely different problem from *Neder*. Here, it is not the fact that the majority below engaged in harmless error analysis that violated the right to a jury trial Petitioner does not contend the error was structural. Instead, in this case, the manner in which analysis was conducted created the Sixth Amendment violation. The majority below focused exclusively on the weight of the untainted evidence without considering whether the wrongly admitted evidence might have had an effect on the verdict actually rendered. It did this despite clear indications from both the Government and the jury that this was a close case (the Government's references to the erroneously admitted evidence in closing argument and the jury's split verdict) and that the improperly admitted evidence was central to the jury's determination (the request for transcript containing wrongfully admitted testimony). The majority hypothesized about an errorless trial that did not occur and based its harmless error analysis on that hypothesis alone. Conducting the harmless error analysis in that manner violated the Sixth Amendment.

This case and the differing analyses of the majority and dissent present a unique opportunity to clarify the correct mode of harmless error analysis. Such a clarification would aid in the resolution of tens of thousands of cases each year and would promote consistency in cases where everyone agrees rules have been broken and rights have been violated.

CONCLUSION

Petitioner requests that this Court grant the petition for a writ of certiorari and set forth a clear framework for applying the harmless error analysis that comports with Sixth Amendment's jury trial guarantee.

Respectfully submitted,

November 4, 2011

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JOINT APPENDIX

RECORD
AND
BRIEFS

No. 11-199

JAN 2 3 2012

In The

Supreme Court of the United States

ALEXANDER VASQUEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

JOINT APPENDIX
VOLUME I PAGES 1-456

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Petition For A Writ Of Certiorari Filed: August 8, 2011
Certiorari Granted: November 28, 2011

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RELEVANT DOCKET ENTRIES FOR
THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
CASE #: 1:08-cr-00625-3

Date Filed	#	Docket Text
09/04/2008	17	INDICTMENT as to Carlos A Cruz (1) count(s) 1-2, Joel D Perez (2) count(s) 1-2, Alexander Vasquez, Jr (3) count(s) 1-2 (yap,) (Entered: 09/05/2008)
08/25/2009	120	MINUTE entry before the Honorable Charles R. Norgle, Sr: Jury trial began. Voir dire held. Jury selected and sworn. Opening arguments heard. Evidence heard. Trial adjourned until 8/26/2009 at 10:00 a.m. Mailed notice (emd,) (Entered: 08/26/2009)
08/26/2009	121	MINUTE entry before the Honorable Charles R. Norgle in regard to defendant, Alexander Vasquez, Jr: Jury trial held on 8/26/2009. Jury trial continued to 8/27/2009 at 10:00 a.m. Mailed notice (ewf,) (Entered: 08/26/2009)
08/27/2009	122	MINUTE entry before the Honorable Charles R. Norgle in regard to defendant, Alexander Vasquez, Jr: Jury trial held on 8/27/2009. Jury trial set is continued to 8/31/2009 at 10:00 a.m. Mailed notice (ewf,) (Entered: 08/28/2009)
08/30/2009	123	MOTION by USA to continue as to Alexander Vasquez, Jr (Lee, Stephen) (Entered: 08/30/2009)
08/31/2009	124	RESPONSE by Alexander Vasquez, Jr to MOTION by USA to continue as to Alexander Vasquez, Jr 123 (Attachments: # 1 Affidavit) (Brindley, Beau) (Entered: 08/31/2009)
08/31/2009	125	MINUTE entry before the Honorable Charles R. Norgle in regard to defendant Alexander Vasquez, Jr. Jury trial held on 8/31/2009. Jury trial is continued to 9/1/2009 at 10:00 a.m. Mailed notice (ewf,) (Entered: 08/31/2009)
08/31/2009	129	ORDER as to Alexander Vasquez, Jr regarding Jose D. Perez 127 Signed by the Honorable Charles R. Norgle, Sr on 8/31/09. (yap,) (Entered: 09/02/2009)
09/01/2009	126	MINUTE entry before the Honorable Charles R.

		Norgle in regard to defendant, Alexander Vasquez Jr.: Jury trial held on 9/1/2009. Jury trial is continued to 9/2/2009 at 10:00 a.m. Mailed notice (ewf,) (Entered: 09/02/2009)
09/02/2009	130	MINUTE entry before the Honorable Charles R. Norgle in regard to defendant, Alexander Vasquez, Jr: Jury trial held on 9/2/2009. Closing arguments heard. Jury deliberations commence. Jury trial continued to 9/3/2009 at 9:00 a.m. Mailed notice (ewf,) (Entered: 09/03/2009)
09/03/2009	131	MINUTE entry before the Honorable Charles R. Norgle, Sr as to Alexander Vasquez. Jr. (3): Jury trial held. Jury verdict of guilty on count one and not guilty on count two. Judgment of guilty entered on the verdict. Trial ends, Defendant is given until 10/5/09 to file post trial motions. Government's response is due 10/19/09. Defendant's reply is due 10/26/09. Case is referred to the probation department for a presentence investigation. Sentencing set for 12/4/09 at 10:30 a.m. Mailed notice (yap,) (Entered: 09/09/2009)
09/03/2009	135	JURY Verdict as to Alexander Vasquez Jr (3) guilty on Count 1, not guilty on Count 2, (Restricted), (yap,) (Entered: 09/10/2009)
12/04/2009	152	JUDGMENT (Sentencing Order) as to Alexander Vasquez. Jr (3): The defendant was found guilty to count(s) one(1) after a plea of not guilty. The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: twenty(20) years. The defendant is remanded to the custody of the United States Marshal. Upon release from imprisonment, the defendant shall be on supervised release for a term of: eight(8) years. Standard conditions of supervision. Special conditions of supervision. Criminal monetary penalties. Schedule of payments. Additional Forfeited Property. Preliminary order of forfeiture. The defendant has been found not guilty on count(s) two(2). (Redacted Image). Alexander Vasquez, Jr terminated. Signed by the Honorable Charles R. Norgle, Sr on 12/4/09.Mailed copy to counsel of record (yap,) (Entered: 12/11/2009)

12/14/2009	**JUDGMENT and Commitment as to Alexander Vasquez, Jr issued to U.S. Marshal (yap,) (Entered: 12/14/2009)**
12/28/2009	**TRANSMITTED to the 7th Circuit supplemental record on appeal as to Alexander Vasquez, Jr consisting of 2 vault items [157 & 158] and certified copy of docket entries. (yap,) (Entered: 12/28/2009)**

RELEVANT DOCKET ENTRIES FOR THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DOCKET #09-4056

Date Filed	#	Docket Text
12/16/2009	1	Criminal case docketed. Fee paid. Docketing statement filed. Appellant's brief due on or before 01/25/2010 for Alexander Vasquez Jr. Record on Appeal from Northern District of Illinois, Eastern Division due by 01/07/2010. Transcript information sheet due by 12/30/2009. [1] [09-4056] (ER)
12/29/2009	3	Filed electronic transcript of proceedings held on 8/16/08. [3] THIS TRANSCRIPT IS FOR INTERNAL COURT USE ONLY. Remote electronic access to the transcript is ONLY available through the District Court's PACER system. [09-4056] (GW)
10/29/2010		Received argument confirmation per argument email form for Blair Westover for Alexander Vasquez Jr., in case 09-4056 [6262377-2] [6262377] [09-4056] (LJ)
11/05/2010	30	Case heard and taken under advisement by panel: Terence T. Evans, Circuit Judge; Diane S. Sykes, Circuit Judge and David F. Hamilton, Circuit Judge. [30] [6264086] [09-4056] (LB)
11/12/2010	32	Filed letter from Appellee USA regarding factual issue raised by one of the panel members. Dist.[32] [6265361] [09-4056] (RS)
11/17/2010	33	Filed letter from Appellant Alexander Vasquez, Jr. regarding Response to factual issue raised by one of the panel members. Dist. [33] [6266391] [09-4056] (RS)
11/18/2010	34	Filed letter from Appellant Alexander Vasquez, Jr. regarding Response to the government's post-argument letter. Dist. [34] [6266782] [09-4056] (RS)
03/14/2011	35	Filed opinion of the court by Judge Evans. AFFIRMED. Terence T. Evans, Circuit Judge; Diane S. Sykes, Circuit Judge and David F. Hamilton, Circuit Judge, dissenting. [35] [6293520] [09-4056] (JLC)
03/14/2011	36	ORDER: Final judgment filed per opinion. With costs: no. [36] [6293521] [09-4056] (JLC)

03/28/2011	37	**Filed 30c Petition for Rehearing and Petition for Rehearing Enbanc by Appellant Alexander Vasquez, Jr. Dist. [37] [6296860] [09-4056] (FP)**
05/10/2011	38	**ORDER: Appellant Alexander Vasquez, Jr. Petition for Rehearing and Petition for Rehearing Enbanc is DENIED. [38] [6307070] [09-4056] (ER)**
11/29/2011	41	**Filed order from the Supreme Court GRANTING the Petition for Writ of Certiorari. 11-199. [41] [6355272] [09-4056] (AM)**

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	08 CR 625
	)	
vs.	)	Chicago, Illinois
	)	August 25, 2009
ALEXANDER VASQUEZ,	)	Approximately 3:00 p.m.
	)	
Defendant.	)	

VOLUME 1
TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE CHARLES R. NORGLE, SR.
AND A JURY

APPEARANCES:

For the Plaintiff:	OFFICE OF THE U.S. ATTORNEY 219 South Dearborn Street 5th Floor Chicago, Illinois 60604 BY: MR. STEPHEN CHAHN LEE MS. KRUTI TRIVEDI
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(Pretrial proceedings and jury voir dire reported but not transcribed.)

THE COURT: Good morning again, members of the jury.

The government may make its opening statement.

OPENING STATEMENT ON BEHALF OF THE PLAINTIFF

MR. LEE: Thank you, your Honor.

Last August, just over a year ago, Alexander Vasquez drove up and parked in a Denny's parking lot in Arlington Heights. It was about 5:30 p.m. that day when Alexander Vasquez was not there to eat, he was there for one reason: He was there to buy a kilogram of cocaine and he had brought with him the money he needed to make that happen.

For inside that car, inside his car there is a secret compartment, and inside that secret compartment was $23,000 in cash that the defendant, Alexander Vasquez had brought with him to make this deal happen. Enough money to buy a kilogram of cocaine, about 2.2 pounds of cocaine.

What the defendant and his partners did not know, despite all of their secrecy and all of their precautions was that the cocaine supplier they were dealing with was actually working for the government.

Ladies and gentlemen, this case is about a drug deal and about the defendant's role in that drug deal.

Now I'm going to take the next 15 minutes or so to do three things:

First, I'm going to talk about the key events that happened around this drug deal.

Second, I'm going to talk about how you are going to learn about this drug deal, basically by the evidence that the government will present to you over the course of this trial.

And third, I'm going to talk to you about the charges that have been brought against the defendant.

Now, first let me talk about the events. As I said, the defendant wanted to buy a kilogram of cocaine that day last summer and he came to Arlington Heights to do just that. But he was not working alone. He was working with a partner, a man named Joel Perez.

Joel Perez had arranged with another man, Carlos Cruz, so they that could meet Cruz's supplier. And that's why Joel Perez and Carlos Cruz arrived that day at the gas station in Arlington Heights at about 5:30 to meet Cruz's supplier.

Cruz and Perez, Perez and Cruz then met with Cruz's supplier and they confirmed what the plan was going to be going forward. In the next step of the plan Perez and Cruz were going to follow Cruz's supplier to a nearby apartment complex where the cocaine was and Perez and Cruz were going to test the quality of the cocaine for themselves and make sure that it was the high-quality cocaine that Cruz's supplier was promising.

But Perez and Cruz had not come to that Arlington Heights gas station by themselves to meet Cruz's supplier. The

defendant was there also. He was there at the Denny's parking lot right next to the gas station. He was there waiting with $23,000 hidden in his car's secret compartment. He was there watching Cruz and Perez meet with Cruz's supplier and he was there waiting for things to unfold.

Now, after the meeting ended Cruz's supplier drove up and Perez and Cruz were supposed to follow him, but Perez and Cruz did not follow Cruz's supplier at this point. Instead, Perez walked from that gas station parking lot across the way to the Denny's parking lot to where the defendant was sitting in his car, and he got into that car, into the passenger side, and he sat there next to the defendant and right behind the $23,000 hidden in the secret compartment.

Now Cruz then came over to the defendant's car and started talking to Perez about the deal, the defendant sitting there right beside him, part of the conversation.

Cruz then got a telephone call from his supplier and Cruz began talking with him over the telephone. As he is talking with him over the telephone, Perez and the defendant also get involved in the conversation. And they tell him, they tell Cruz to tell Cruz's supplier that they don't want to go along with the plan of following Cruz's supplier to the apartment complex, they want Cruz's supplier to bring the cocaine back, back to the Denny's parking lot so they can finish the deal right there.

And Perez and the defendant tell Cruz to tell Cruz's supplier over the telephone that they have the money to do the deal right there.

The supplier agreed to do so and then the three met, Carlos Cruz, Joel Perez and the defendant waited. They waited for the supplier to come back with the cocaine and they waited to complete the drug deal.

But the supplier never came back and the deal did not get done. And that's because a few minutes later, a few minutes after they began waiting, law enforcement agents arrived on foot and by car, yelling out "police" and with sirens blaring, coming there to arrest these three men.

Now Carlos Cruz, at that point he was standing outside the defendant's car and he surrendered instantly. But the defendant, who was still sitting in the driver's seat of his car, still sitting there with Joel Perez, his partner, sitting next to him, the defendant decided to do something different. He backed up his car, hitting into two Arlington Heights police cars and then drove off into oncoming traffic, all in an effort to get away.

Now defendant, he drove about two miles down the road, and then he abandoned his car in a Walmart parking lot, and the defendant and Joel Perez, they got out of their car and they wanted to find a place to hide and they hid in a nearby McDonald's.

Now as this is happening, law enforcement agents were looking for the defendant, and law enforcement agents did find their car in the Walmart parking lot and agents found the defendant hiding in the McDonald's. At that point the defendant and his partner, Joel Perez, they ran out of the McDonald's on foot and then fled in separate directions.

One Arlington Heights police officer found the defendant and took him into custody, and in searching him found a cellular telephone that the defendant had used to keep in contact with Perez throughout the day as all the plans for the deal had taken place.

Another officer found Perez and also found near him on the ground two cellular telephones, telephones that had been in contact with Carlos Cruz and also had been in contact with the defendant throughout the course of the day as this deal was taking shape.

Later that day law enforcement agents searched the defendant's car and they found the secret compartment that was inside. They found the secret compartment hidden in the front side passenger's dashboard where the air bag of a car usually is.

When they opened that secret compartment, they found inside $23,000 in cash, the money that the defendant had brought to complete the deal for the kilogram of cocaine.

Now, those are the key events in this case.

Now let me tell you about the evidence that the government will present to you over the course of this trial and which will prove beyond a reasonable doubt that the defendant committed the crimes that are charged in the indictment.

There are basically five categories of that evidence the government will present to you over the course of this trial.

First, there is an insider testimony from Carlos Cruz who is a key figure in this crime.

There are going to be recordings involving Carlos Cruz and Joel Perez, the two men whom the defendant worked with in the course of this crime.

There are going to be phone records that will show you that the defendant was talking with Joel Perez throughout that day while Perez was setting up the deal with Carlos Cruz and with Carlos Cruz's supplier.

There will be a law enforcement agent who will talk to you about how he worked with the government's confidential source, Cruz's supplier, and who tried to arrest the defendant in that Denny's parking lot.

You are also going to hear from law enforcement agents who looked for the defendant, found the defendant's car, and found the defendant hiding in the McDonald's.

Now let's go through these categories of evidence.

As I mentioned, you are going to hear from Carlos Cruz himself. Now, Carlos Cruz was a very key figure in this deal. He was the middleman who connected Perez and the defendant with his supplier. He will come and tell you about his involvement in this drug deal. He will tell you that Joel Perez was looking for a kilogram of high-quality cocaine and was willing to pay a good amount of money for it.

He will tell you that he picked up Perez in Chicago and drove with him to Arlington Heights to meet with Cruz's supplier as planned. And I expect that he will tell you that he set up a plan to do the deal with Perez.

And I expect that Carlos Cruz will tell you that in his plan he and Perez were going to go to Arlington Heights to meet with Cruz's supplier and first check out the quality of the cocaine, and that if the quality of the cocaine, if the quality of the cocaine was high quality, they would go back to Chicago, get the money for the deal, and then come back and finish the deal. So two trips, not just one, between Chicago and Arlington Heights.

And I expect that Carlos Cruz will tell you that he had this plan because this was a safety precaution. He didn't want Perez to bring the money with him. And I expect that he will tell you that Perez assured Carlos Cruz that this -- that he agreed and that he was going to go along with that.

I expect that Carlos Cruz will also tell you that he

quickly learned that Joel Perez and the defendant changed that plan. And that in fact Perez had brought the defendant into the plan, bringing in someone that Carlos Cruz did not know, and that Perez and the defendant told Carlos Cruz that they had the money with them at that location at the Denny's parking lot to complete the deal.

Now, you should listen carefully to the testimony that Carlos Cruz will make in court. He has pled guilty to what he did that day, and he is testifying in the hopes of getting a reduced sentence. You should pay close attention to what he says and evaluate his testimony, but you should evaluate his testimony in light of everything that he says, in the light of all the other evidence in the case, the other categories that I will talk a little about in a few minutes.

The recording that corroborates what he will tell you about how he was in contact with Perez over the course of the day. The phone records -- the recordings, the recordings between him and the confidential source and Joel Perez, as well as the phone records. And also in light of the defendant's own actions, showing up with the $23,000 in a drug deal and then fleeing.

There are also going to be some recordings. As I mentioned, the government will also present you with recordings that the confidential source made involving Carlos Cruz and Joel Perez.

Now, because those recordings are mostly in Spanish, you are not going to actually hear the recordings themselves, but you will see and hear transcripts and translations of those recordings.

These recordings are going to take you into the workings of this drug deal and will show you how Carlos Cruz and Joel Perez, even while talking with people they trusted, used code language in order to protect themselves.

The evidence will show that the confidential source, the man who Cruz thought of as his supplier, never talked with the defendant during the course of this deal. And so the confidential source, Cruz's supplier, never got a chance to record any conversation with the defendant.

Nevertheless, you will hear evidence about what the defendant said and did based on the other evidence that the government will present.

There is going to be phone records in this case. You are going to see telephone records for the telephone that was found on the defendant when he was caught by the Arlington Heights police and you are going to be see phone records for the two phones that were found near where Joel Perez was caught by Arlington Heights police, and phone records for the phone that Carlos Cruz used that day and phone records for the phone that the confidential source used in order to set up his deal with Carlos Cruz.

There is going to be a lot of phone records and when you take them altogether, they are going show you how events unfolded on August 4th and August 5th, 2008. These records are going to show you how the telephones -- how the confidential source calls Carlos Cruz setting off a series of calls between the confidential source and Carlos Cruz, between Carlos Cruz and Joel Perez, and between Joel Perez and the defendant. Much of these records are going to corroborate what Carlos Cruz tells you.

They are also going to tell you that the defendant and Joel Perez were in contact at key times in connection with this deal. They are going to show you that they were in contact right around the time that Joel Perez told Carlos Cruz that the deal was a go, that they were going to go do this.

And they are also going to show you that the defendant was in contact with Joel Perez while Joel Perez was going with Carlos Cruz to Arlington Heights, and just minutes before all four men arrive at the same location, again, the Shell gas station in Arlington Heights, the Denny's restaurant next door.

You are also going to hear from several law enforcement agents. You will hear from an agent from the Drug Enforcement Administration who worked with the confidential source during the course of this investigation. He was one of the agents who tried to arrest the defendant at the Denny's

parking lot that day.

That agent will tell you that when he tried to arrest the defendant, the defendant tried to get away by ramming his car into two Arlington Heights police cars and then rushing into oncoming traffic.

You are also going to hear from the Arlington Heights police officers who were involved in finding the defendant and arresting the defendant and Joel Perez later that day. They will tell you how they found the defendant hiding in a McDonald's and how he ran from them and how they finally caught him.

And you will hear from the law enforcement agent who will tell you about how he was involved in searching the defendant's car and how he found the secret compartment in the car, opened it up and found the $23,000 in cash that the defendant had brought with him to the drug deal that day at the Denny's and the Shell gas station.

Now, let me talk about the two charges in this case.

First, the defendant has been charged with conspiring with Joel Perez and Carlos Cruz to possess cocaine with the intent to distribute it.

Now, conspiracy is a legal word meaning agreement. Basically, you are going to be asked to determine whether the defendant had an agreement with Joel Perez and Carlos Cruz to get a kilogram of cocaine that day and to distribute it.

Second, the defendant has been charged with attempting to possess cocaine with the intent to distribute. And basically there, you will be asked to determine whether the defendant tried to get a kilogram of cocaine with the intent to distribute it afterwards.

These are the two crimes that the defendant has been charged with. These charges are what the government will prove to you over the course of this trial beyond a reasonable doubt.

Now, in order to prove these charges the government must prove, among other things, that defendant knew what he was doing and what he did. And on this point, there is a specific type -- specific type of evidence that you are going to be told that you are allowed to consider.

Regarding the defendant's knowledge and intent, you are going to hear from a DuPage County sheriff's detective who is going to come and tell you about an investigation that he did involving the defendant a few years ago.

That detective will come here and he will tell you that when he did his investigation a few years ago, the defendant was working with Joel Perez to commit a crime.

That detective will also tell you that in the course of his investigation he learned that the defendant was working with Joel Perez to sell about $4,000 worth of cocaine to a government informant.

And third, the detective will tell you that in the

course of that crime the defendant and Joel Perez used a car which had a secret compartment in it, a secret compartment hidden in the front side passenger dashboard of the car, the same area where the secret compartment was in the car used in the charged crimes.

That, ladies and gentlemen, is a preview of what the evidence that Miss Trivedi and I will present to you over the course of the next few days.

By the end of the trial you will have seen the inner workings of this drug deal. You will have learned how this deal was supposed to go down. And you will have learned how Perez and the defendant changed that plan and how things actually happened, and you'll have learned how the defendant knowingly and intentionally participated in this deal.

You will have heard from the defendant's co-conspirator, Carlos Cruz. You'll have seen telephone records showing how the defendant kept in contact with other members of the conspiracy. And you will have learned and heard how the defendant fled, not once, but twice, when the deal went bad.

Then at the close of this case Miss Trivedi and I will get another chance to talk with you. We will review all the evidence with you. And after we have done so, we will ask you to evaluate all the evidence using your common sense and we will ask you to return a verdict of guilty on both counts.

Thank you.

THE COURT: Defense.

OPENING STATEMENT ON BEHALF OF THE DEFENDANT

MR. BRINDLEY: Ladies and gentlemen, don't let there be any confusion in this case. This case is about one thing and one thing only. This case is about the question of whether this man right here, Alexander Vasquez, knew about and agreed to participate in a drug deal on August 5th, 2008. That's the question in this case.

Now, you are going to hear, we expect, throughout this trial a lot of evidence about whether my client, Mr. Vasquez, resisted arrest on the day of August the 5th.

But, ladies and gentlemen, you are also going to learn in this case that my client is not charged with resisting arrest. No one will ask you to judge him for that crime. So his past background with the police and the reasons why he might want to flee when they come around aren't going to tell you what he knew or didn't know on August 5th, 2008, and that's what you are here to decide. So don't let there be confusion.

You are going to hear evidence about a crime that happened a few years ago, a few years ago, 2002, ladies and gentlemen. You are going to hear that seven years ago Alex Vasquez was involved in a drug crime. Seven years.

What you are going to find out about that crime is when Alex Vasquez was involved in a drug crime in 2002, when he

did commit it, he admitted it. He pled guilty and he did his time.

And so, ladies and gentlemen, what you are going to find out is that you are not asked here to judge Alexander Vasquez for what he did in 2002. You are here to decide what he did on August the 5th, 2008. And the evidence is going to show you what whatever he knew and whatever he did seven years ago is not going to tell us anything of what he actually knew on August the 5th, 2008, which is the day that counts in this case.

When you think about a criminal case the most simple way, child's-eye way to look at it, is that a criminal case is like a jigsaw puzzle you put together. Each fact constitutes a separate piece and when you put it all together, it's supposed to reveal a picture of what happened in the case.

In this case you are going to learn from the evidence that when you put together all the facts about August the 5th of 2008, the day that matters, when you put them all together, they do show you a picture. They show you a picture of a man who has been brought here because of what he did in the past, not what he did in this case. That picture is going to show you in this case because of what happened on August the 5th, 2008, Alexander Vasquez is not guilty.

So let's talk about the facts, not about resisting arrest, not about 2002, but about the drug deal on August the

5th.

Fact number one: Nobody, nobody ever heard Alexander Vasquez agree to knowing about or participating in this drug deal on August 5th, 2008, before these people went out to Arlington Heights. Nobody, you will not hear from a single witness that ever heard him say he knew or that ever heard him agree to do it.

Fact number two: You are not going to hear from anybody, nobody ever saw Alexander Vasquez handle any money or access any trap compartment on any car on August the 5th, 2008, or any day in 2008. Nobody.

Fact number three: During the time when the real drug transaction on August 5th, 2008, was going on in Arlington Heights, you are going to find out there was a conversation going on. Alexander Vasquez, he wasn't even there. He never talked to the government's informant who was selling the cocaine. He never talked to Carlos Cruz during this conversation, who was setting up this deal with Joel Perez. He wasn't there at all. He never said anything.

He was in a different parking lot. You are going to find out he never got out of his car, never showed any interest in participating in these events at all.

Now those are facts about the drug deal on August the 5th.

See, ladies and gentlemen, what you are going to find

out is that when it came to the drug deal on August the 5th, 2008, Alexander Vasquez, he didn't say anything about a drug deal when they are having this transaction. He didn't do anything to do with the drug deal when this transaction is going on.

You are going to find out that the reason for that, the evidence is going to show, is because he didn't know what Joel Perez had set up to go on that day. He didn't know. What he did was get in his car and go out to give his cousin a ride back. Took his cousin's car to pick hum up because he was supposed to need a ride. That's what Alexander Vasquez did, and he didn't know anything about what Perez had done before.

Now, in this case you are going to find out about this 2002 thing. That's going to help us for one reason because that's going to show you how Joel Perez and Alexander Vasquez acted when they did deal with cocaine and were selling cocaine together.

What you are going to find is that out when they were working together in 2002, Alexander Vasquez was on the phone having direct contact with the buyer of this cocaine. He talked to him directly on the day of the deal. When the deal came around, Vasquez was present. Not only was he present, you'll find he got out of the car, he gave the man the cocaine, he took the money. He was involved in every aspect of that deal.

That's what it was like when he and Perez worked together to sell cocaine. They went in one car. There is no question both of them were doing this and both of them were in contact on that date.

August the 5th, 2008, you are going to find that Alexander Vasquez never called any of these people that were supposed to be doing this deal. Not only didn't he call, but you are going to find out from this Carlos Cruz he didn't even know who he was. Nobody said anything about Alexander Vasquez having anything to do with this. Nothing. It was as if he didn't know anything about it.

See, what you are going to find out, ladies and gentlemen, happened on August the 5th is there was a government informant, his name was Diaz. And he was trying to set up a cocaine deal with Carlos Cruz.

So he called Carlos Cruz and they had a conversation that was recorded. And you are going to find out that Carlos Cruz contacted a customer who he had who he thought would want to buy that cocaine, but he didn't contact Alexander Vasquez. He didn't know who he was.

He called Joel Perez, and you will learn that it was Joel Perez who said he wanted to buy the kilogram of cocaine when he was speaking to Carlos Cruz. You will learn that it was Joel Perez that made the arrangements and talked to Carlos Cruz. It was Joel Perez who was setting this whole thing up.

Here is what else you are going to learn about Joel Perez. See, you're going to find out that after Joel Perez and Alexander Vasquez got arrested in 2002, when that thing was over, Alexander Vasquez, he admitted what he did, he pled guilty, he went to prison, he did his time.

You are not going to hear a single witness testify in this court in this trial who is going to tell you that Alexander Vasquez sold him cocaine after he got out of prison or that they offered to sell cocaine to Alexander Vasquez after he got out of prison or that he bought cocaine from anybody when he got out of prison. No such person exists.

You won't even hear from anybody who says Alexander Vasquez called me on the phone about cocaine sales after he got out of prison. But Joel Perez, he made different choices.

When Alexander Vasquez got out of prison, he was done with cocaine. You'll see that from the evidence. Joel Perez, you'll learn he was in prison with this guy Carlos Cruz. When Joel Perez got out of jail, he got on the phone. He was calling Carlos Cruz. He is asking about setting up a drug deal. He is asking about getting cocaine. He still wants to do that. And in all of that, nobody ever mentioned Alexander Vasquez calling Cruz or having anything to do with him.

When he talked to Carlos Cruz on August the 5th about the deal that matters in this case, you will find out that Joel Perez didn't tell him anything about there being another person

involved in buying this cocaine. Didn't tell him anything about Alexander Vasquez knowing anything or doing anything. Nothing.

You will find out that it was Joel Perez who arranged the times when he was going to meet with Carlos Cruz and the government informant who was supposed to sell the cocaine. It was Joel Perez who was standing alone when Carlos Cruz picked him up in his car, Cruz's car.

It was Joel Perez that rode with Carlos Cruz to this Shell gas station in Arlington Heights where this deal was supposed to happen. When the government informant got there, it was Joel Perez who approached him with Carlos Cruz. It was Joel Perez who talked to him and tried to find out if the quality was good. It was all Joel Perez. And in all of that Joel Perez never mentioned anything about Alexander Vasquez.

Ladies and gentlemen, you will find out from the evidence nobody did. It was as if he had nothing to do with it because the evidence will show he didn't. Nobody told him what they were doing. That's why nobody mentioned him when they were doing it.

Now, you've heard all of this talk already and you are going to find evidence and hear evidence about this car that Alexander Vasquez had and drove to Arlington Heights that day when the evidence is going to show you that was not his car, Joel Perez's car.

You are going to find out how Joel Perez bought that car and paid for it in cash. You are going to see title documents that show Joel Perez put his wife's name on the car. You are going to find out that sometime later when he wanted to get the name of that car away from his family, you're going to find out that he went behind Alexander Vasquez's back and put Alexander Vasquez's daughter's name on the title form and claimed that the car had sold. But you are going to know that it's a fraud. The evidence is going to show that.

Because you will see that title document and there is a phone number on it that is supposed to be the phone number for Myra Vasquez, the person buying the car, and you will never guess whose phone it was. You are going to find out about that number.

It is the same phone number of the phone Joel Perez had in his pocket and threw away when they come to arrest him. That's right. He forged those documents on that car. It was his, and the evidence is going to show that absolute. You will hear from multiple witnesses who will establish it was Joel Perez that had that car and Joel Perez that drove that car.

On August the 5th of 2008, you are going to find out that car was at Joel Perez's house. Joel Perez and his wife and his son drove in that car to go shopping in the morning, throughout most of the afternoon. You are going to find out that Alexander Vasquez was never alone with that car or with

Joel Perez at any point that would allow him to put any money in it before Perez went out to Arlington Heights.

Now, if there was any money hidden in that car, it was something that Joel Perez did. If there was any trap compartment in that car, it was something that Joel Perez did because he is the one that had it. The evidence will show that to you.

We have heard suggestions the defendant was putting money in this car and driving his money and his car. It wasn't his car and it wasn't his money. You are going to find out because this is a trap compartment that has to be opened and accessed to put things inside.

You will find no evidence in this case, hear nothing about any fingerprints from Alexander Vasquez being identified in that trap compartment or in the area you had to access to open it up, none, because he didn't. He didn't know about it. That's what the evidence is going show you about the car involved in this transaction on August the 5th.

What happened on August 5th with Alexander Vasquez, he made a mistake. When his cousin, Joel Perez, who is family to him, needed a ride back from Arlington Heights, Alexander Vasquez agreed to take Joel's car out and pick him up. Joel was supposed to be coming out of the Denny's. That's what the evidence is going to show.

You are going to find that out because when Alexander

Vasquez went out there to Arlington Heights, the drug deal was going on at this Shell gas station. That's where these guys were supposed to be transacting the business. That's where Perez went with Cruz. That's where Perez and Cruz met with Diaz, the informant.

Vasquez wasn't even in the right parking lot. Ladies and gentlemen, the evidence will show he didn't know what was going on. He was waiting for Perez to come out of the Denny's. But Perez didn't come out of the Denny's.

You are going to find out what happened in the deal was it fell through because Perez, when he heard that the informant wanted him to go to some other location to see some cocaine, he said then I'm not doing this deal. And you are going to find out Perez walked off of that deal.

You are going to know that is true because you're going to learn Carlos Cruz got in his car and he started to drive away. There was no deal at that point. Alexander Vasquez this whole time is sitting at the Denny's wondering where in the world is Perez and what is he doing.

Okay. Now ultimately what's going to happen, ladies and gentlemen, is Perez will call through on the phone and say no deal, never, I don't want to deal with this guy at all, and Cruz won't like it. Cruz goes back over to the car, he sees where Perez is, he's now approaching Vasquez, he's getting into this black car. And Cruz walks over there, trying to convince

Perez, I think, to agree to go back and do this deal.

No one will ever really know what was going to happen because as he started to approach, Alexander Vasquez, he didn't want anything to do with whatever they were doing. He didn't know where Perez had been, he didn't know what was going on. He pulled the car out and he started to leave.

When that happened, the agents who had been monitoring the situation who had heard recordings of Carlos Cruz and Joel Perez meeting with this informant, the law enforcement, they didn't want to let him get away. You are going to find out law enforcement officers pulled that car to try to stop Alexander Vasquez from driving away.

When they did that, you are going to see law enforcement vehicles struck Alexander Vasquez's car from both sides, sandwiching it, to try to immobilize it. And when that happened, ladies and gentlemen, Alexander Vasquez, he did make a mistake. He panicked. He hadn't known what Perez had done. He hadn't seen what was going on. He was getting hit by two cars. He tried to get away.

And when he realized it was the police, Alexander Vasquez was afraid. He was on parole for his other case. He had a collision. He knew he was going to go back to jail and, yeah, he ran. But nobody and no evidence is going to show that it was because he ever knew what they were doing. All the facts are going to suggest that he had no idea because he was

in the wrong place and he didn't play any part in any of the discussions that were part of this deal.

What happened eventually is he left the car at a Walmart. He went to a McDonald's. When the police came after him outside the McDonald's, you are going to find Alexander Vasquez gave up.

But the way that he gave up is going to be a little different from what you hear about Joel Perez. When they caught Joel Perez, you're going to find that Perez threw his cellphones away. He's got two of them, he throws them away because he's got to hide. And when they get those phones, those phones show calls to Carlos Cruz to set up the deal.

Now, when they went to arrest Alexander Vasquez, he made no attempt to throw away any phone. The phone was in his pocket. They took it out. Joel Perez had phones under fictitious names. Alexander Vasquez didn't. Alexander Vasquez didn't have anything to hide.

When they looked at that phone for Alexander Vasquez, the evidence is going to show you, you are going to learn they didn't find any call to Carlos Cruz or to anybody connected with cocaine in any way except his cousin Joel Perez, who was a member of his family. Unfortunately, that is something he can't choose.

You are going to hear that they had multiple phone contacts on August the 5th suggesting he must have known,

asking you to assume he must have known. But, ladies and gentlemen, you are going find out when you look at all the phone records that Alexander Vasquez and Joel Perez talked to each other on the phone regularly. It's not something that just happened on August the 5th. It's not going to tell you anything.

Alexander Vasquez got arrested and that's what the evidence will show. That's what the evidence is. It shows that Alexander Vasquez got convicted in 2002, admitted what he did, went to prison. Then when two police cars came and hit his car and he got scared and didn't know what was going on, he ran away, and that's it.

There is not going to be any actual evidence to show you that he heard what Perez was going to do or he knew what Perez was going to do or played any part in that drug transaction. That evidence doesn't exist. And aside from asking you to make assumptions, when we get down to the actual proof it's going to be missing.

And what you are going to find out is that's a problem because when the government brought this case against Alexander Vasquez, when they brought these charges, what they really did is they made a promise, to you and me and everybody they promised they would prove their case beyond a reasonable doubt. That means they would prove that he knew beyond a reasonable doubt; they would prove that he agreed to

participate beyond a reasonable doubt. But you won't hear that because there is no such evidence. Because the government isn't going to be able change the facts. They are what they are.

Fact one: Alexander Vasquez, nobody ever heard him agree to knowing about this. Nobody ever heard him agree to play a part in this before they went out to Arlington Heights.

Fact number two: Nobody ever saw Alexander Vasquez handle any money or any trap compartment on August 5th, 2008.

Fact number three: When the transaction was going on and everybody was talking about the deal, he wasn't there. Said nothing. He did nothing. He was in another parking lot sitting in Joel Perez's car with no idea what Joel Perez did. That's all the evidence is going to show.

In the end, ladies and gentlemen, when this case is finished you will have all of the facts about August the 5th, 2008, and you put all these facts together and you set aside all the extra pieces that have to do with resisting arrest or something that happened seven years ago.

When you put it all together, you are going to be left with one picture. It's a picture that's going to show you that in this drug transaction there is one person that is guilty and there is one person that is not. Joel Perez was guilty. Alexander Vasquez wasn't.

So that is why at the end of this case I'm going to

come back before you and I'm going to ask you to render a verdict that reflects what the facts about August 5th, 2008, tell us, and that's going to be a verdict of not guilty.

THE COURT: Please call the next witness -- or first witness, I should say.

MS. TRIVEDI: Thank you, your Honor.

The government calls Special Agent James Chupik.

THE COURT: Please raise your right hand and be sworn.

(Witness sworn.)

THE COURT: Please be seated.

THE WITNESS: Thank you, your Honor.

THE COURT: Members of the jury, if you can't hear a witness, you can raise your hand and we will make sure that the witness speaks up or that we will adjust the microphones.

JAMES CHUPIK, PLAINTIFF'S WITNESS, SWORN

DIRECT EXAMINATION

BY MS. TRIVEDI:

Q. Good afternoon.

A. Good afternoon, ma'am.

Q. Can you please state and spell your name.

A. James Chupik, J-A-M-E-S, last name, Chupik, C-H-U-P-I-K.

Q. Are you currently employed?

A. Yes, ma'am, I am.

Q. Where do you work?

A. I work for the United States Department of Justice Drug Enforcement Administration.

Q. What's your rank?

A. Special Agent.

Q. How long have you been a special agent with the United States Drug Enforcement Agency?

A. Since January of 2004.

Q. Before that, what did you do?

A. From May of 1996 through January of 2004, I worked for the Norfolk, Virginia, Police Department.

Q. What did you do at the Norfolk Police Department?

A. I spent approximately two years in uniform patrol and then the remaining time as a narcotics investigator, most of which I was assigned to DEA as a task force officer.

Q. Is DEA a shortened version of Drug Enforcement Administration?

A. Yes, ma'am. Sorry.

Q. During your time as a law enforcement officer, both with the Norfolk Police Department and with DEA, have you received any training?

A. Yes, I have.

Q. What sorts of training have you received?

A. Six-month police academy in Norfolk, Virginia. Multiple courses dealing with narcotics investigations, confidential force management -- confidential source management, undercover

management, expert testimony. 16 weeks' basic agent training academy with the DEA, instructor development course. I'm a certified instructer for DEA.

Q. Are you familiar with the term confidential source?

A. Yes, ma'am, I am.

Q. What is a confidential source, Agent Chupik?

A. A confidential source in general describes an individual who for their own reason has decided to cooperate with the government, law enforcement, in the furtherance of their investigation.

Q. Have you received training in working with confidential sources?

A. Yes, ma'am.

Q. What sorts of training have you received?

A. Besides on-the-job training from senior agents over the last 11 years, I have also attended undercover operations, confidential source management, schools taught by the Virginia Department of Criminal Justice Services, as well as we covered extensively during the DEA academy.

Q. Drawing your attention now, Agent Chupik, to August of 2008, were you involved in an investigation of Carlos Cruz, Joel Perez, and Alexander Vasquez at that time?

A. Yes, ma'am, I was.

Q. How did that investigation begin?

A. My confidential source, Alejandro Diaz, initially

identified an individual who he knew by the name of Tony who he later identified as Carlos Cruz. Carlos Cruz was known to the informant as a former purchaser of cocaine.

Q. After you learned that Cruz was a former purchaser, what did you do?

A. I instructed the confidential source to begin describing a plot that we came up with that he had available kilograms of cocaine that were for sale for $23,000 and to see if Carlos Cruz would be interested in purchasing one or more.

Q. And if Carlos Cruz was interested in purchasing, what was the plan?

A. The plan was eventually to arrange a meeting between the confidential source and Carlos Cruz, as well as any customers that we had not identified at that point, and eventually arrest them.

Q. Did the source provide you with any numbers associated with Carlos Cruz?

A. Yes, he did.

Q. What number did the source provide you?

A. Carlos Cruz's cellular telephone number, which is (773) 865-4913.

Q. Did you meet with the source on August 4th, 2008?

A. Yes, I did.

Q. At that point what did you discuss with the source?

A. We reiterated our plot that he had kilograms of cocaine

for sale and instructed him to place a recorded phone call in our presence to Carlos Cruz to ascertain whether or not Carlos Cruz wanted to purchase any.

Q. What happened next?

A. I equipped the confidential source with a digital recording device that has a microphone that can be placed in the confidential source's ear, instructed him to place the microphone in his ear.

I then had the confidential source dial Carlos Cruz's phone number, the phone number I just recited. Prior to him placing the phone call, I viewed the LED reading on his phone to confirm that he did in fact dial the number he gave us for Cruz and then instructed him to place the call. As he placed the call, I pressed the "record" on the recording device.

Q. What happened after the source had dialed Carlos Cruz's phone number?

A. He spoke with a Hispanic male. I could only hear the confidential source's side of the conversation, but I could tell it was a male voice on the phone that the confidential source was talking to.

Q. And what language were they speaking in?

A. Spanish.

Q. After the conversation was completed, what happened next?

A. I deactivated the recording device and then I debriefed the confidential source regarding the conversation that he just

had with Carlos Cruz.
Q. Did you do anything else later with the recording?
A. I downloaded that phone call from the digital recorder onto a compact disk.
Q. Did you later download it onto another disk?
A. Yes, I did.
MS. TRIVEDI: Permission to approach, your Honor.
THE COURT: Proceed.
BY THE WITNESS:
A. Yes, ma'am.
BY MS. TRIVEDI:
Q. Agent Chupik, I've handed you what's marked as Government Exhibit Recording of August 4th, 2008, Phone Call.
A. Yes, ma'am.
Q. Do you recognize that object?
A. This is the -- this is the compact disk that contains the call that I monitored and recorded with the confidential source, between the source and Cruz on August 4th, 2008.
Q. How do you recognize it?
A. Carlos Cruz and I both listened to it together and afterwards we both initialed the disk. Our initials are both contained on the disk.
MS. TRIVEDI: Your Honor, at this point the government would move to admit Government Exhibit August 8th Recording Telephone Call -- or August 4th, 20008 Phone Call.

MR. BRINDLEY: No objection to that, your Honor.

THE COURT: All right. The exhibit is received.

(Government Exhibit Recording of August 4th, 2008, Phone Call received in evidence.)

BY MS. TRIVEDI:

Q. Agent Chupik, based on the information that the confidential source provided you about Carlos Cruz after that August 4, 2008, phone call, what did you do next?

A. I instructed the confidential source to be available early the next morning, August 5th, and to meet me in Arlington Heights.

Q. Now drawing your attention to August 5th, 2008, in the morning, did you meet with the confidential source then?

A. Yes, ma'am, I did.

Q. What did you do?

A. We brought him to the Arlington Heights Police Department where he placed additional phone calls to Carlos Cruz to coordinate a meeting later in the day so that Carlos Cruz could ultimately purchase the kilogram of cocaine.

Q. And so to be clear, what did you instruct the confidential source to do during the call with Carlos Cruz?

A. Specifically I instructed the source to direct Carlos Cruz and his customers to meet us at the Shell gas station parking lot located on the southwest corner of Arlington Heights Road and Algonquin Road in Arlington Heights.

Once at that location later in the day when he met with Carlos Cruz and the customers, the confidential source was to lead Cruz and his customers to a nearby parking lot. We picked that parking lot, it was approximately a half a mile from the Shell gas station parking lot, because we felt it provided us the safest place to effect the arrest and minimize safety issues to the public.

Q. Did you observe the confidential source place calls to Carlos Cruz that day?

A. Yes, ma'am, I did.

Q. Based on your -- did you then debrief the confidential source?

A. Regarding? I'm sorry.

Q. Regarding some of the information?

A. Yes, ma'am.

Q. Based on that and what you had observed, did you take any further steps?

A. Yes, ma'am, I did.

After we provided him with what we wanted him to do in terms of the meeting later, later that afternoon we searched the confidential source, as well as his vehicle, to make sure he had no drugs, no currency, no weapons, any contraband prior to going to meet with Carlos Cruz.

I then equipped him with a digital recording device to be placed on his person while he met with Carlos Cruz and

his customers.
Q. Once you prepared the source, what did you do next?
A. I provided assignments to various other law enforcement, Arlington Heights police officers, as well as DEA agents. Those assignments included some of the cars were to go to the area of the Shell gas station and assist me in monitoring the initial meet between the source and Carlos Cruz and his customer. The remaining officers, law enforcement officers were directed to go to the area of the parking lot where we anticipated the arrest would occur.
Q. After you had instructed the officers and prepared the source, what happened next?
A. My partner and I -- at that time was riding with me was Task Force Officer Rudy Avalos. We followed the confidential source up Arlington Heights Road to the Shell gas station which again is located on the southwest corner of Algonquin Road and Arlington Heights Road.
Q. What was the confidential source driving?
A. A bright red VW Volkswagen bug.
Q. What were you driving?
A. A blue Chrysler Pacifica.
Q. Was yours a law enforcement vehicle?
A. DEA vehicle, yes, ma'am.
Q. Was it marked?
A. Unmarked.

Q. Was it equipped with lights and sirens?
A. Yes.
Q. Was anyone else with you?
A. My partner that day was Task Force Officer Avalos.
Q. You mentioned you were also dealing with other law enforcement officers?
A. Yes, ma'am.
Q. Were you keeping in contact with those officers throughout the day?
A. Yes, I was. Via police radio, DEA radio, and cellphone.
MS. TRIVEDI: Permission to approach, your Honor.
THE COURT: Yes.
BY MS. TRIVEDI:
Q. Agent Chupik, I'm handing you what's been marked as Government Exhibit Shell Photo 1.
A. Yes, ma'am.
Q. Have you had a chance to review it?
A. Yes, I have.
Q. Do you recognize it?
A. This is a photograph of the Shell gas station parking lot I previously testified to. It's looking towards the west from the east side of the parking lot. You can see a Denny's which is the adjoining commercial building just to the west.
Q. Does that photograph truly and accurately depict the scene on August 5th, 2008?

A. For the most part. However, the vegetation, the bushes and trees that separate the Shell gas station parking lot and the Denny's lot are much more overgrown in this photo than they were in 2008, August 5th.

Q. Was this photo taken on August 5th, 2008?

A. No, ma'am, it was taken over the last month approximately.

MS. TRIVEDI: Your Honor, the government moves to admit Government Exhibit Shell Photo 1.

MR. BRINDLEY: No objection.

THE COURT: It is received and may be published to the jury.

(Government Exhibit Shell Photo 1 received in evidence.)

BY MS. TRIVEDI:

Q. Agent Chupik, the photograph I have just published, Shell Photo 1, you were discussing that this depicted the Shell station that you had previously described, is that correct?

A. That is correct.

Q. Can you sort of orient us in this picture, where exactly -- what are we looking at?

A. You are looking at the far right-hand side. This building to the left-hand side of the photo is the far right-hand side of the convenience store. And obviously, there is two parking places, two parking spots and a handicapped spot, then a median.

On the other side of the median is the east side of the parking lot belonging to the Denny's restaurant, which is just west of the Shell gas station on Algonquin Road.

Q. So is the Denny's parking lot then adjacent to the Shell?

A. Yes, approximately ten feet.

Q. And what is separating the two?

A. A -- I would call it a raised median and some bushes.

Q. You earlier talked about bushes that seem to be bigger than they were on August 4th, 2008.

A. Yes, ma'am.

Q. Are those bushes depicted on this photo a larger size?

A. Yes, ma'am.

Q. Where are the bushes?

A. You can see the warning sign, the bushes right around that warning sign as well as in between the light pole and the handicapped sign.

Q. In what town was the gas station located, Agent Chupik?

A. Arlington Heights, Illinois.

MS. TRIVEDI: Permission to approach, your Honor.

THE COURT: Yes.

BY MS. TRIVEDI:

Q. Agent Chupik, I'm handing you what's been marked as Government Exhibit Arlington Heights Photo 1.

A. Yes, ma'am.

Q. Have you had an opportunity to review it?

A. Yes, I have.
Q. Do you recognize the scene depicted in that photo?
A. Yes, I do.
Q. What is it?
A. It is an aerial photograph, a group of maps of the intersection -- the southwest corner of the intersection of Arlington Heights Road and Algonquin Road in Arlington Heights, Illinois.
Q. Does that photograph truly and accurately depict that intersection?
A. Yes, it does.
Q. Is it in substantially the same condition that it was, that intersection, on August 5th, 2008?
A. Yes, ma'am.

MS. TRIVEDI: Your Honor, the government would ask that Arlington Heights Photo 1 be admitted into evidence.

MR. BRINDLEY: No objection, your Honor.

THE COURT: All right. It is received and may be published to the jury.

(Government Exhibit Arlington Heights Photo 1 received in evidence.)

BY MS. TRIVEDI:
Q. Agent Chupik, I've just published Government Exhibit Arlington Heights Photo.

Could you please tell us, Agent Chupik, as to what we

are looking at here in the photo.

A. Starting at the top of the photograph, there is a multi-lane road --

THE COURT: Just a minute. It may be easier if the witness were to leave the stand and walk over to the screen. Would you leave.

THE WITNESS: Yes, your Honor.

THE COURT: All right.

BY THE WITNESS:

A. This road here is Arlington Heights Road. It runs north and south. The road across the top of the map, it runs for the most part northeast -- excuse me, northwest to southeast. That's Algonquin Road.

This right here is the Shell gas station and its parking lot. This is the convenience store. This end here is the actual restrooms which are depicted in the first photo you observed. This is the canopy which covers the gas pumps.

This is the east side of the parking lot belonging to the Denny's, which is this square building here, and of course it has a parking lot going all the way around (indicating).

BY MS. TRIVEDI:

Q. Is there any separation between the eastbound and westbound lanes of Algonquin Road?

A. Yes, ma'am. There is one right-hand turn lane, three travel lanes, two left-hand turn lanes, and there's a raised

median that separates the eastbound lanes from the westbound lanes.

Q. Agent Chupik, you mentioned you had followed the source to the Shell, the Shell depicted on that photo?

A. Yes, ma'am.

Q. Where is it?

A. Again, this is the Shell parking lot with the convenience store and the canopy where the gas pumps are located (indicating).

Q. Where exactly did you see the source go in the Shell, Agent Chupik?

A. He entered through the entrance on Algonquin Road and he parked over here near the handicapped parking place (indicating).

Q. After the source -- I'm sorry. Let me clear that up.

Did you see any other cars in the lot?

A. Yes, ma'am. Within a few seconds of the confidential source pulling into the parking lot, my partner and I, who were traveling eastbound on Algonquin Road, we then turned south on Arlington Heights Road.

As we did so, we saw the confidential source parked here and there was a Dodge -- we found out later it was a Dodge Nitro, at that time we believed it was a silver SUV -- parked right next to it where the confidential source parked, and there were two Hispanic males who were getting out of the car

and just beginning to walk away from the car towards the confidential source's vehicle.

Q. Where did you go after that?

A. It was rush-hour traffic. I couldn't stop here. I didn't want to pull in the parking lot, so I continued south and then there is another entrance driveway on the south side which right down here there is a bank. I think it's a bank, it's a commercial complex.

We entered this driveway into the Denny's parking lot and pulled into here briefly, very briefly because as soon as I pulled in, I told my partner this is way too close, because when I did I observed that the two individuals that got out of the Dodge Nitro are now standing next to the passenger side of the confidential source's Volkswagen bug.

So I immediately backed out of the parking place and continued around the Denny's. If you look all the way up at the top, the last parking place next to the curb in the Denny's lot is the handicapped parking. I pulled in nose first facing eastbound in that parking place (indicating).

Q. Why did you pick that parking spot?

A. Again, the parking lot that we anticipated the confidential source would lead the -- Carlos Cruz and his customers to was over here to the east. So it made sense to me that if the confidential source followed our instructions, he would exit on to Algonquin.

So from that parking place where I pulled to and parked I could see down the sidewalk the entrance and exit to the Algonquin exit of the Shell gas station. So I wanted to be able to observe the confidential source when he left, as well as call out any cars and vehicles that are following it.

Q. You mentioned, Agent Chupik, that you had seen two individuals near the confidential source's car. Did you later learn who those individuals were?

A. One was Carlos Cruz and the second was Joel Perez.

Q. Moving down to where your car was in that spot, the handicapped spot from the vantage point --

A. Yes, ma'am.

Q. -- did you notice anything of interest then while you were sitting in that spot?

A. Very briefly after I parked I observed the confidential source's red Volkswagen bug pull out of the Shell gas station. However, nobody was following him and it was just the confidential source in the vehicle.

Q. What was the plan?

A. The plan was for the customers to follow the confidential source in their vehicle to the nearby parking lot.

Q. After you saw the red car leave, what did you do next?

A. Simultaneously I called -- I called after the confidential source left to other surveillance and arrest agents to let them know that he left, that nobody was

following.

I also began making my exit out of the Denny's lot to try to catch up to the confidential source because that was -- my number one priority or role was to protect the CS as his cover agent, and I made a phone call to the confidential source to find out what just happened, why nobody was following him.

Q. When you made the phone call, did the confidential source pick up?

A. Yes, he did.

Q. And did you instruct the source to do anything?

A. I instructed the confidential source to call Carlos Cruz back and try to determine why they did not follow him and whether or not they wanted to complete the sale.

I also asked him to try to determine whether or not they had the money before he would come back to the Shell gas station.

Q. While you are talking to the confidential source, what are you physically doing at the time other than talking?

A. I'm finally making my way out of the parking lot on to Algonquin Road.

Once I -- based on the information the confidential source provided to me, I let him go. He continued eastbound on Algonquin and I again circled in rush-hour traffic around Arlington Heights Road and eventually into this driveway here (indicating), back -- back into the far west side of the

Denny's lot.

Q. After you had entered into the Shell lot, Agent Chupik, what did you do?

A. I observed that a Hispanic male was now standing in -- approximately in this area right here directly next to the passenger side of a black vehicle (indicating).

Again, I was in rush-hour traffic, so I could not stop in the middle of the road and keep watching. I had to go into the Shell gas station lot. So I pulled all the way to the far south end of the lot so that the subjects standing, Carlos Cruz and the occupants of the black car, could not see me because of the building, the convenience store.

Q. So the subject standing next to the car, did you identify him?

A. Later identified as Carlos Cruz when we arrested him, yes, ma'am.

Q. And that was the same man standing by the car when you were on the road near the Shell gas station?

A. That is correct.

Q. After you got into the lot, what did you do?

A. By the time I got into the lot, or very shortly after, I pulled into the lot and parked down here (indicating). The confidential source contacted me on my cellphone.

Based on the conversation I had with the confidential source, I believed that it was time to make the arrest. So I

broadcast it over police radios for other units, surveillance units, and the Arlington Heights units and the arrest teams to effect the arrest.

Q. Once you made that announcement over the radio, what did you do?

A. I began driving in my car, parked in front of the convenience store storefront, and parked my car right here at an angle in the handicapped parking spot. (Indicating.)

Q. At that point did you notice any other law enforcement officers in the area?

A. Yes, ma'am, I did. I activated my lights and siren myself. My partner got out of my car and began running from our location across the median towards Carlos Cruz and the black car.

My supervisor, Group Supervisor Kirk Seeley, the commander for the Arlington Heights detective division and two other agents were also on foot running from our direction into the Denny's lot.

Q. Agent Chupik, you previously have briefly described the scene at the time. You have mentioned you were with some other agents. Were their vehicles also there?

A. Yes. The arresting vehicles entered the parking lot from the south in the Denny's lot. Specifically, I remember two unmarked Arlington Heights police cars and one black Chevy Trailblazer, which is a DEA unmarked police car.

Q. Did you hear any lights and sirens at the time?
A. In addition to mine, every car that I saw in the Denny's lot had their lights on. I did hear multiple sirens, but it was very noisy, very loud.

Myself and other agents and law enforcement were screaming "police" and running towards -- either running towards the car or pulling up in the car. But I can't tell you exactly which cars had their sirens on, but I heard more than one siren.

Q. Why were you yelling "Police" or why were there lights and sirens?
A. Because we were about to make an arrest for people that we suspected were involved in a drug deal. We did not want them to confuse us for anything other than the police. For example, a would-be robber, which would be a safety issue, could be a safety issue.
Q. What were you wearing at the time?
A. I was wearing plain clothes, probably jeans and a t-shirt or a collar shirt, a golf-style shirt with my DEA issue black vest, which has a Velcro patch across the chest, has a bright gold embroidered emblem of the DEA badge, then it says "Police" in gold embroidered letters.

MS. TRIVEDI: Permission to approach, your Honor.

THE COURT: Yes.

BY MS. TRIVEDI:

Q. Agent Chupik, I'm handing you what has been marked as Government Exhibit Patch Photo.
A. This is an accurate depiction and photocopy of the patch that Velcros right to the chest of my ballistic vest.
MS. TRIVEDI: Permission to publish, your Honor, and admit.
THE COURT: Yes. It is received and may be published.
(Government Exhibit Patch Photo received in evidence.)
BY MS. TRIVEDI:
Q. Were other law enforcement officers also wearing clothing that you could see that was associated with police or law enforcement?
A. Yes, ma'am, they were. I specifically remember my boss, for example, had on his DEA-issued vest with his police emblem on it as well.
Q. Did you hear other yells of police as you were running?
A. Multiple, multiple yells from different agents in law enforcement, yes, ma'am.
Q. Now, you mentioned two Arlington Heights cars in the Denny's parking lot. Did you happen to see where those cars were located?
A. Yes, I did.
MS. TRIVEDI: Permission to approach, your Honor.
THE COURT: Yes.

It might be easier for the agent to approach you. You can take that by the tripod and step over there, Agent.

Is there any objection to the admissibility of this exhibit?

MR. BRINDLEY: No, none, your Honor.

THE COURT: All right. How is it marked, counsel?

MS. TRIVEDI: This will be marked for demonstrative purposes as Government Exhibit Parking Lot Blowup.

THE COURT: It is received for that limited purpose and you can show it to the jury on the tripod.

(Government Exhibit Parking Lot Blowup received in evidence.)

BY MS. TRIVEDI:

Q. Agent Chupik, what does Government Exhibit Parking Lot Blowup depict?

A. It's an identical photograph of what's on the overhead, as well as the exhibit the government entered just a little while ago.

Q. Is it a larger -- is it a blowup of a certain -- well, now I guess that's on the projection. Is the bottom portion of the photograph cut off in the demonstrative?

A. Yes, ma'am. You don't see the "Google dot-com," I think it is.

Q. Other than that, does it truly and accurately depict the exhibit?

A. Yes, it does.

MS. TRIVEDI: Permission to approach, your Honor.

THE COURT: Yes.

BY MS. TRIVEDI:

Q. Agent Chupik, I'm handing you three magnets, two are blue and one is red. You mentioned that you had seen two Arlington Heights police cars in the Denny's lot. Can you please place the blue magnets on the demonstrative to indicate where the Arlington Heights police cars were in the lot when you were running toward the black car.

A. The first unmarked police car traveled in from the south and parked approximately like this. The second one approximately like this (indicating).

Q. Can you tell us about the black car, where was it located?

A. The black car was parked with its bumper facing to the east that way. It was either in this parking place, this parking spot or this parking spot. Like this, again approximate. (Indicating.)

Q. Now, as you were running towards the black car, Agent Chupik, what did you see?

A. Several things happened at once.

We were giving Carlos Cruz, who was standing next to the car, commands to put his hands up. He did put his hands up. No resistance whatsoever.

At approximately the same exact time as we were crossing this median into the Denny's parking lot, my supervisor Kirk Seeley, S-E-E-L-E-Y, tripped and fell toward the ground and then he fell forward and head first into the front bumper of the black car.

As that happened, these police cars were moving into position behind the black car.

Q. After the police cars had moved into position, where were you at that time?

A. I was at least halfway through this median here (indicating).

Q. You mentioned something had happened to your supervisor. When did that happen?

A. He and I were nearly side by side, we were running through. So he was more or less right beside me. My supervisor was approximately one or two steps ahead of me running.

Q. And then what did you see happened?

A. Again, Carlos Cruz placed his hands up, compliant. My supervisor tripped, face first into the front bumper hood of the black Bonneville. And at the same exact time that Kirk Seeley, my supervisor, like I said, head butted the front of the car, the car spun into reverse.

Q. For the record, is that the black Bonneville you are discussing?

A. Yes, ma'am.
Q. As the black Bonneville was spinning into reverse, what were you doing?
A. One, I was -- looked briefly after my boss to see if he was okay. At the same time I was paying attention to Carlos Cruz, who again was being compliant. There was three or four of us, so I wasn't concerned about him.

As the car backed up in reverse, it struck these two Arlington Heights unmarked police cars. I bypassed -- ran past Carlos Cruz because, again, there were other agents and officers there with their guns out dealing with him. I ran this way toward the exit to Algonquin Road.

After the black car struck two police cars, I was standing here and stopped briefly and then it traveled forwards, forwards striking at least one of the two police cars again.

At this point I was standing in front of the car with my gun out. I pointed the gun at the driver, was giving a command to stop. He obviously was not going to stop.

I ran out of the way as the car continued out on Algonquin Road eastbound -- correction -- westbound and heading eastbound in rush-hour traffic on Algonquin Road.
Q. Did you see where that car went?
A. It continued westbound in the eastbound lanes of travel zigzagging in and out of cars. Eventually when it made it to

the intersection, just transferred over to the proper lane of travel.

MS. TRIVEDI: Your Honor, it might be an appropriate time for the agent to sit back down.

THE COURT: It might be an appropriate time to stop for the day.

So you can take the stand for the moment, Agent.

THE WITNESS: Yes, your Honor.

THE COURT: Members of the jury, this is a good stopping time. So when you return tomorrow morning, we will pick up with the testimony right where it ends at the moment.

You are on the jury. Do not let anybody interfere with your jury service.

You are not to discuss this case amongst yourselves or with any other persons. You are not to do any kind of investigation, directly or indirectly.

Do not go to the places that you are hearing about. Do not conduct any kind of electronic investigation or using the Internet or Google or Yahoo or anything else to learn about this case or the situation or any of the issues involved. You must confine your experience here to what you hear and see within these four walls. So do not conduct any kind of investigation whatsoever.

Don't talk to anyone about this case. Do not converse with one another about this case. It is -- that is

extremely important.

You are excused for the day, and when you come back tomorrow morning go directly to the jury deliberation room that you were in before. Be here by 10:00 o'clock, no later. We will attempt to start at 10:00 o'clock. There are a few other things that I must deal with unrelated to this case, but I will make every effort to see to it that we start on time.

In addition to all of that, if everything works out, there will also be Dunkin' Donuts and coffee in the jury deliberation room. But don't depend 100 percent on that. That's what we are going to try to do.

You are free to bring your own treats, if that's what you want to call it. That's up to you. But we will make an effort to have the Dunkin' Donuts and the coffee there at about 10:00 o'clock.

So when you come back tomorrow, you are to use the elevators on the south side of the building, which is the Dunkin' Donuts side. Everyone else involved with the case will use the elevators on the north side, which is the Berghoff side.

And so you won't be seeing anyone. You won't be talking to anyone. The lawyers are not permitted to talk to you. Any witnesses involved are not permitted to talk to you. Keep that in mind. So if you feel like you are being shunned, that that's the way it should be. So you are free for the day.

Return tomorrow at 10:00.

The witness is excused. He too will return tomorrow at 10:00 o'clock.

Court is adjourned until then. You are free to go.

Counsel, remain for a minute.

(Jury out.)

THE COURT: The jury has left the room. Court is in session.

I have one or two things to take care of tomorrow morning, but will make every effort to start on time at 10:00 o'clock.

So have enough witnesses lined up so that we can take up the entire day.

I won't hold you any longer. Court is adjourned.

MR. LEE: Thank you, your Honor.

MR. BRINDLEY: Thank you, your Honor.

(Proceedings adjourned at 4:30 p.m. to 10:00 a.m.)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	08 CR 625
	)	
vs.	)	Chicago, Illinois
	)	August 26, 2009
ALEXANDER VASQUEZ,	)	10:00 a.m.
	)	
Defendant.	)	

VOLUME 2
TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE CHARLES R. NORGLE, SR.
AND A JURY

APPEARANCES:

For the Plaintiff:	OFFICE OF THE U.S. ATTORNEY 219 South Dearborn Street 5th Floor Chicago, Illinois 60604 BY: MR. STEPHEN CHAHN LEE MS. KRUTI TRIVEDI
For the Defendant:	LAW OFFICES OF BEAU B. BRINDLEY 53 West Jackson Boulevard Suite 1605 Chicago, Illinois 60604 BY: MR. BEAU B. BRINDLEY MS. BLAIR WESTOVER
Court Reporter:	MAELLEN E. PITTMAN Official Court Reporter 219 South Dearborn Street Room 2342 Chicago, Illinois 60604 (312) 435-5576

(Proceedings heard in open court. Jury out.)

THE COURT: All right. We should be ready to proceed in a couple of minutes.

Will the prosecution be ready?

MR. LEE: Yes, your Honor.

THE COURT: Will the defense be ready?

MR. BRINDLEY: Yes, your Honor.

THE COURT: Notwithstanding that you are wearing that bright red tie, you are ready to go?

MR. BRINDLEY: Oh, yes, your Honor.

THE COURT: Okay. The coffee and doughnuts have arrived. The jury is in good spirits and we should be ready to go as soon as they are all here.

MR. BRINDLEY: All right. Thank you, your Honor.

MR. LEE: Thank you, your Honor.

THE COURT: What about your client?

MR. BRINDLEY: Not here. I hear the marshals coming in right now.

THE COURT: All right. Very well.

THE CLERK: Be here at 10:00.

(Recess.)

THE COURT: All right. The defendant is personally present.

I have received a note from the CSO from the jury; "Judge Norgle: The jurors respectfully request that

we be provided with notebooks and pens so that we can take notes. Thank you in advance. Best, Donald Cole."

What is the defendant's position?

MR. BRINDLEY: We have no objection to that, your Honor, providing the notebooks and pens to the jury.

THE COURT: What is the government's position?

MR. LEE: No objection, your Honor.

THE COURT: The note is a little late in coming because they haven't had the opportunity to take notes of the opening statements or the testimony up to this point by the agent who is presently on the stand.

However, since there is no objection on either side, we will see to it that the jurors do get the notebooks and pens or pencils.

All right. We will take a couple of minutes so Mr. Fulbright can put that together.

MR. LEE: Thank you, your Honor.

MR. BRINDLEY: Thank you, your Honor.

(Recess.)

(Jury in.)

THE CLERK: Court is in session. Please be seated.

THE COURT: Good morning, members of the jury.

You are being permitted to take notes if you want to take notes. You are not required to take notes. If you wish to take notes, you may take notes. But what is very important

in this case is that you listen very closely to the evidence and that you look at the witnesses when they are testifying. If you feel the need to take notes, certainly you may take notes. But do not lose the idea of observing and listening to what is going on.

So you may take notes if you choose to. You are not required to take notes. That's strictly up to you.

All right. Please recall the witness.

MS. TRIVEDI: Thank you, your Honor.

The government recalls Agent James Chupik.

JAMES CHUPIK, PLAINTIFF'S WITNESS, PREVIOUSLY SWORN

DIRECT EXAMINATION (Resumed)

BY MS. TRIVEDI:

Q. Good morning.

A. Good morning, ma'am.

Q. Could you please state and spell your name for the reporter.

A. James Chupik. First name James, J-A-M-E-S, last name Chupik, C-H-U-P-I-K.

Q. Agent Chupik, yesterday when you testified you talked about events that happened near the Shell gas station parking lot and Denny's parking lot in Arlington Heights.

Today we are going to discuss those -- the events that you observed in a little bit more detail and then pick up where we left off.

A. Okay.
Q. First, you mentioned that you saw the source park in the Shell gas station and within a few seconds noticed a Dodge Nitro next to it.
A. That's correct.
Q. Who did you see at that point in the gas station, if anyone?
A. At that point I just saw them as Hispanic males, later identified them as Carlos Cruz and Joel Perez.
Q. What were Cruz and Perez doing?
A. They were walking away from their silver SUV, which I later found was a Dodge Nitro, toward the confidential sources's red VW bug.
Q. Where were you when you observed this, Agent Chupik?
A. I was driving by the Shell gas station parking lot on Arlington Heights Road.
Q. Did you notice if there were cars at that time in the lot?
A. There were other cars getting gas, but over in that northwest corner where the handicapped parking place is, no. No, ma'am.
Q. What did you do after you noticed Cruz and Perez in the lot?
A. I continued south on Arlington Heights Road and the next driveway south of the Shell lot is a driveway that leads to, I

believe, it's a bank complex. I went down that road and into the east side parking lot of the Denny's parking lot, which is just west of Arlington -- of the Shell gas station.

Q. When you got to the Denny's lot, what did you see?

A. I pulled into the far east parking spaces right -- right just next to the actual Shell convenience store, and I observed that Carlos Cruz and Joel Perez were standing next to the confidential source's vehicle.

Q. Can you tell the jury approximately where you remember Cruz and Perez standing in relation to the source's car?

A. They were -- Joel Perez and Carlos Cruz were standing next to one another and they were near the passenger side door of the CS vehicle, source vehicle.

Q. From where you were in the Denny's lot, did you have any difficulty seeing Cruz and Perez?

A. I did not. In fact, we were so close and so -- we could see them so easily, they could have seen us if they looked at us. That's why I immediately left because I was afraid that if they saw me that they might abort the deal and suspect us of being law enforcement.

Q. At the time you were in the Denny's lot, did you notice any other cars in your vicinity?

A. No, ma'am, I did not.

Q. Now, after you left that part of the Denny's lot, Agent Chupik, what did you do?

A. I drove around the Denny's parking lot to the west side and I parked in the handicapped parking place on the far north side of the lot against the curb of Algonquin Road.
Q. About how long were you parked there?
A. A very short time, 30 seconds to a minute at the most.
Q. During the time that were you parked there, did you see anything of interest?
A. Confidential source, red VW bug left. He was the only occupant of the vehicle. I then waited a brief amount of time to see if anyone did in fact follow him, which was the plan that we provided to the CS.
Q. Did, in fact, anyone follow him?
A. No, they did not.
Q. After you had waited and realized that no one was following, what did you do, Agent Chupik?
A. I called the source to find out what happened, why Cruz, Perez, why the customers, cocaine customers had not followed. Then I directed him to contact Cruz and find out whether they intended to finish the deal and try to find out whether or not they had the money with them.
Q. Agent Chupik, approximately how long was it between the time that you saw Cruz and Perez first in the lot when you were on the road circling and the time when you saw the confidential source leave in the red car?
A. Just a couple of minutes.

Q. Did the source call you back?
A. Yes, he did.
Q. Based on what you saw and based on what the source told you, at that point -- let me rephrase the question.
When the source called you back, where were you?
A. I was back on -- I think I was back on Arlington Heights Road, again circling to maintain some containment of where Cruz, Perez and the black car were and their Dodge Nitro. Then I received a phone call, I believe I was on Arlington Heights Road when he called me back right in front of the Shell lot.
Q. Agent Chupik, you said you wanted to have containment of the black car. So at that point had you also seen the black car?
A. Yes. I had seen the black car with Carlos Cruz standing next to the passenger side in the Denny's lot.
Q. Let's place that in time. I think you did talk about that a little bit yesterday.
A. Yes, ma'am.
Q. When in relation to the red car leaving the lot did you see the black car leaving the lot, from the Denny's lot?
A. After I observed the CS, the source vehicle leave, I waited a brief amount of time. After I did not see anyone follow, I began driving as I was talking to the source and then directing him to call Cruz to find why they had not followed.
Once the source told me that -- once I -- based on

the conversation with the source, I knew that they were still in the parking lot. They had not left. At that time I just turned on Arlington Heights Road.

I looked through the Shell parking lot. I saw that the Dodge Nitro was unoccupied, there was no one standing next to it, and I began looking to find out where Cruz and Perez had gone to. That's when I saw Cruz being in the next lot, the Denny's lot right behind the Dodge Nitro and next to a black car.

Q. Based on what you had seen and what the source had told you, what did you do?

A. I provided the arrest signal via police radio to other agents in the area to effect the arrest of Cruz and anyone that was in the black vehicle.

Q. Agent Chupik, you talked briefly yesterday about how other law enforcement joined you. Approximately how many other law enforcement agents joined you?

A. On foot, running from the Shell gas station into the Denny's lot it was myself and approximately five other law enforcement.

In the Denny's lot there were two -- at least two unmarked Arlington Heights police cars and one unmarked DEA SUV police car.

Q. What were the other officers who were with you wearing?

A. I know that myself, my partner, my supervisor, and the

commander for the Arlington Heights detective agents, we were all wearing police vests with some sort of police emblem or markings on it. There were two agents that were somewhat behind me in the running to the Denny's lot.

I can't recall what they were wearing.

Q. And did you notice lights and sirens?

A. My lights and sirens were on. There were lights on the Arlington Heights unmarked police cars. There were other sirens going, but I can't specify which ones. I can't tell you today which ones actually had their sirens on.

Q. Agent Chupik, as you were running, did you happen to notice the black car that you said you had previously seen earlier that night?

A. Yes, sir.

Q. What did you notice about it, if anything?

A. As my supervisor fell into the hood of the car, it backed up pretty much simultaneously with him striking the hood of the car.

Q. Before your supervisor fell onto the hood of the car, were you able see whether or not there was anyone in the car?

A. There was Perez who was in the passenger seat and a Hispanic male driver. I didn't see anybody else in the car.

Q. Did you later identify that Hispanic male driver?

A. As the defendant, Alexander Vasquez, that was later at the Arlington Heights Police Department, the first time I saw

him face-to-face.
Q. Do you see Alexander Vasquez here in the courtroom today?
A. I see him to my left, with defense counsel, Beau Brindley.
MS. TRIVEDI: Your Honor, may the record reflect that Agent Chupik has identified the defendant?
THE COURT: Yes. So ordered.
BY MS. TRIVEDI:
Q. Did you have an opportunity as you were running towards the black car to see the expressions on the faces of the defendant, of Perez, of Carlos Cruz?
A. All three defendants were surprised. Their eyes were big. They seemed startled, surprised.
Q. What did Mr. Cruz do as you approached?
A. He raised his hands up straight over his head and complied with law enforcement commands. He was arrested without any resistance whatsoever.
Q. What did Mr. Perez -- Messrs. Perez and Vasquez do as you approached?
A. I'm not sure what Mr. Perez did, but Mr. Vasquez, as the driver, put the car in reverse at practically the same time that my boss hit the hood, backed in reverse towards the south and struck two Arlington Heights police cars.
Q. What happened next?
A. With Mr. Cruz being compliant with his hands up and not

resisting, I ran towards the exit on to Algonquin Road of the Denny's parking lot because that's the way the black Pontiac Bonneville is now facing.

I don't know why I thought that he would stop for a human, but I stood in front of the car and I pointed my gun at the driver, but then when it started accelerating towards the exit, I jumped out of the way.

Q. Did you then watch where the car went?

A. It went westbound on Algonquin Road in the eastbound lanes of travel.

Q. After you saw the car leave, what did you do?

A. I returned to Mr. Cruz and assisted in handcuffing and completing the arrest of Cruz.

Q. While Mr. Cruz was being arrested, was anything obtained from him?

A. One cellular telephone.

MS. TRIVEDI: Permission to approach, your Honor.

THE COURT: Proceed.

BY MS. TRIVEDI:

Q. Agent Chupik, I'm handing you what's been marked as Government Exhibit Cruz Phone.

A. Yes, ma'am.

Q. Have you had an opportunity to look at that?

A. Yes, I have.

Q. Do you recognize it?

A. This is the phone that was recovered from Carlos Cruz's person at the time of the arrest as processed, sealed, and marked DEA evidence No. N122 by me.

MS. TRIVEDI: Your Honor, at this point the government would move for the admission of Government Exhibit Cruz Phone.

MR. BRINDLEY: No objection.

THE COURT: The exhibit is received and may be shown to the jury.

(Government Exhibit Cruz Phone received in evidence.)

THE COURT: Members of the jury, when you go in to deliberate at the end of the case you'll have a greater opportunity to examine all of the evidence in the case.

BY MS. TRIVEDI:

Q. Agent Chupik, I notice the phone is in a couple of pieces. Was the phone working at the time you first saw it?

A. Yes, it was.

Q. How do you know it was working?

A. The phone rang shortly after Mr. Cruz was handcuffed, while we were still sitting there in the Denny's lot.

Q. Did you get a chance to see who was calling Mr. Cruz?

A. My confidential source.

Q. Subsequent to that day did you obtain phone records for Government Exhibit Cruz Phone?

A. Yes, I did.

MS. TRIVEDI: Permission to approach, your Honor.

THE COURT: Do you intend to offer these as business records?

MS. TRIVEDI: Yes, your Honor.

In addition, we have a stipulation that will be read at a later time.

THE COURT: There is no objection?

MR. BRINDLEY: No objection, your Honor.

THE COURT: And there is a stipulation?

MR. BRINDLEY: There is a stipulation on this matter.

THE COURT: All right. Proceed.

MS. TRIVEDI: Thank you, your Honor.

BY MS. TRIVEDI:

Q. Agent Chupik, I'm handing you what's been marked as Government Exhibit Billing Records For (773) 865-4913.

A. Yes, ma'am.

Q. Have you had an opportunity to review those records?

A. Not each and every one of them, but in general, yes, ma'am.

Q. And previously have you reviewed those records?

A. Yes, I have.

Q. Are those the records related to the phone of Carlos Cruz?

A. (773) 865-4913, subscribed to Carlos Cruz, yes, ma'am.

Q. And just to be clear, Agent Chupik, when was the first

time that you started -- or rather, was that the number that the confidential source -- you saw the confidential source dial when you were placing recorded calls?

A. Yes, ma'am.

Q. We've talked about what happened to Mr. Cruz after he returned to the lot, Agent Chupik.

Did you see the black car again later that night?

A. Yes, I did.

Q. Where did you see it?

A. I first saw it in the Walmart parking lot in Rolling Meadows and then later that evening at the Arlington Heights Police Department.

Q. Later that day, did you receive any cellphones?

A. Yes, I did.

Q. What cellphones did you receive?

A. I received a total of three cellular telephones. One was recovered from the defendant, Alexander Vasquez, and two other phones were recovered in the vicinity of where Joel Perez was apprehended in between a McDonald's and a bank in Rolling Meadows.

Q. Agent Chupik, I will be handing you what's marked as Government Exhibit Vasquez Phone, Government Exhibit Perez Phone 8098, and Government Exhibit Perez Phone 0452.

MS. TRIVEDI: Approach?

THE COURT: Proceed.

BY THE WITNESS:

A. Government Exhibit Perez Phone 0452 corresponds to one of the phones I received that was recovered on the ground near Perez's arrest. It corresponds to the phone number (773) 910-0452, marked DEA Exhibit N111.

Government Exhibit Perez Phone 8098 corresponds with the second phone found near where Perez was apprehended. It's marked DEA Exhibit N110 and corresponds with telephone number (773) 310-8098.

And the third one is Government Exhibit Vasquez Phone which was recovered from his person at the time he was arrested. It's DEA Exhibit N120, corresponds with cellular telephone (773) 785-6969.

MS. TRIVEDI: Your Honor, the government moves for the admission of Perez Phone 0452, Perez Phone 8098, and Vasquez Phone.

MR. BRINDLEY: No objection.

THE COURT: All three are received and may be shown to the jury.

(Government Exhibits Perez Phone 0452, Perez Phone 8098, and Vasquez Phone received in evidence.)

BY MS. TRIVEDI:

Q. Focusing on Government Exhibit Vasquez Phone, Agent Chupik, did you learn the phone number associated with that phone?

A. Yes, ma'am, I did.
Q. And what was the phone number associated with that phone?
A. (708) 785-6969.
Q. Did you also obtain records to figure out to whom the phone was registered?
A. Yes, ma'am, I did.
Q. And to whom was the phone registered?
A. Alexander Vasquez at, I believe it was 7550 Forest Preserve Drive in Chicago.
MS. TRIVEDI: Permission to approach.
THE COURT: Yes.
BY MS. TRIVEDI:
Q. Agent Chupik, I'm handing you what's been marked as Government Exhibit Subscriber Information for (708) 785-6969.
A. Yes, ma'am.
Q. Do you recognize that document?
A. This is the subscriber report which I just testified to for that phone number.
Q. And what does the subscriber report tell you?
A. It tells quite a few things, including the subscriber's name, address, driver's license number, date of birth, the date that it was established -- that the account was established, current balance.
MS. TRIVEDI: The government would move for the admission of Government Exhibit --

THE COURT: Is this also part of your stipulation to come?

MR. BRINDLEY: It is, your Honor, it is.

THE COURT: All right. The exhibit is received.

(Government Exhibit Subscriber Information for (708) 785-6969 received in evidence.)

MS. TRIVEDI: Permission to publish, your Honor?

THE COURT: Yes.

BY MS. TRIVEDI:

Q. Agent Chupik, I'm showing you what's been admitted as Government Exhibit Subscriber Information for (708) 785-6969.

Agent Chupik, you mentioned earlier that you had learned of an address for Alexander Vasquez. What was that address?

A. 7550 West Forest Preserve Avenue, actually, it says Norridge, Illinois. I believe that's Chicago, but I'm not positive.

Q. And that's the address on the subscriber information?

A. Yes, ma'am.

Q. Does the record also list a user?

A. 7554 West Forest Preserve Avenue in Norridge, Illinois.

Q. Does it have a user name?

A. Alexander Vasquez.

Q. We have also talked about two exhibits that have been admitted as Perez Phones, Agent Chupik.

A. Yes, ma'am.
Q. Did you receive information about who was the person who was the subscriber for those phones?
A. I have.
Q. And who were those phones subscribed to?
A. I don't believe they were to Joel Perez. They were to fictitious names or unidentifiable names. I don't recall the exact subscriber names at all.
Q. Did you obtain phone records for the phones?
A. Yes, I did.
MS. TRIVEDI: May I approach?
THE COURT: Yes.
BY MS. TRIVEDI:
Q. Agent Chupik, I'm handing you what has been marked as Government Exhibit Call Detail Records for (773) 310-8098, Call Detail Records for (708) 785-6969, and Call Detail Records for (773) 910-0452.
THE COURT: Is there a stipulation as to their admissibility?
MR. BRINDLEY: Yes, there is, your Honor.
THE COURT: All right. They are received and may be considered by the jury.
(Government Exhibits Call Detail Records For (773) 310-8098, Call Detail Records For (708) 785-6969, and Call Detail Records For (773) 910-0452 received in evidence.)

MS. TRIVEDI: Thank you, your Honor.

THE COURT: You may inquire with respect to them, however.

MS. TRIVEDI: Thank you.

THE COURT: As I have said, members of the jury, you will have a greater opportunity to examine all of these records when you go in to deliberate.

MS. TRIVEDI: Your Honor, at this point the government would request the opportunity to read a stipulation.

THE COURT: All right. You may read the stipulation into the record.

MS. TRIVEDI: Stipulation:

The United States of America, through Assistant United States Attorneys Stephen Chahn Lee and Kruti Trivedi, and the defendant, Alexander Vasquez, Jr., individually and through his attorney, Beau Brindley, hereby agree and stipulate that the following facts are true:

Government Exhibit Call Detail Records For (708) 785-6969 is a true and accurate copy of call detail records for (708) 785-6969 that were made by U.S. Cellular at or near the time of the occurrences in the matters set forth therein, that were kept in the course of regularly conducted business activities, and that were made by U.S. Cellular as part of its regular practice to keep.

Government Exhibit Subscriber Information for (708)

785-6969 is a true and accurate copy of records that were made by U.S. Cellular at or near the time of occurrence of the matters set forth therein, at or near the time of the occurrences of the matters set forth therein, that were kept in the course of regularly conducted business activities, and that were made by U.S. Cellular as part of its regular practice to keep.

Government Exhibit Call Detail Records for (773) 310-8098 is a true and accurate copy of call detail records for (773) 310-8098 made by U.S. Cellular at or near the time of the occurrences set forth therein, that were kept in the course of regularly conducted business activities, and that were made by U.S. Cellular as part of its regular practice to keep.

Government Exhibit Call Detail Records For (773) 910-0452 is a true and accurate copy of call detail records for (773) 910-0452 that were made by U.S. Cellular at or near the time of the occurrence of the matters set forth therein, that were kept in the course of regularly conducted business activities, and that were made by U.S. Cellular as part of its regular practice to keep.

Government Exhibit Billing Records for (773) 386-6161 is a true and accurate copy of billing records for (773) 386-6161 that were made by U.S. Cellular at or near the time of occurrence of the matters set forth therein, that were kept in the course of regularly conducted business activities, and that

were made by U.S. Cellular as part of its regular practice to keep.

In its billing records, U.S. Cellular typically does not track details as to the telephone numbers that make an incoming call to a U.S. Cellular phone.

In its call detail records U.S. Cellular does track the telephone number that makes an incoming call to a U.S. Cellular phone, but those records track telephone switch transactions rather than telephone calls. A single telephone call may involve multiple telephone switch transactions. As a result, a single telephone call may appear in U.S. Cellular's call records -- call detail records as multiple entries corresponding to multiple telephone switch transactions.

Government Exhibit Billing Records for (773) 865-4913 is a true and accurate copy of billing records for (773) 865-4913 that were made by T-Mobile at or near the time of the occurrence of the matters set forth therein, that were kept in the course of regularly conducted business activities, and that were made by T-Mobile as part of its regular practice to keep.

Due to T-Mobile's practices of keeping time, the call times identified on Government Exhibit Billing Records for (773) 865-4913 should be adjusted by three hours in order to correspond to times in and around Chicago, Illinois.

For example, a call that is listed in Government Exhibit Billing Records for (773) 865-4913 as occurring at 13

hours 27 minutes and zero seconds must be treated as occurring at approximately 16 hours 27 minutes and zero seconds; in other words, 4:27 p.m. in and around Chicago, Illinois.

To the extent there is any doubt, your Honor, the government moves for admission of all the phone records that we have discussed.

THE COURT: They are received and may be considered by the jury.

(Government Exhibits Government Exhibit Call Detail Records For (708) 785-6969, Subscriber Information For (708) 785-6969, Call Detail Records For (773) 310-8098, Government Exhibit Call Detail Records For (773) 910-0452, Government Exhibit Billing Records For (773) 386-6161, Government Exhibit Billing Records For (773) 865-4913, received in evidence.)

MS. TRIVEDI: Thank you.

BY MS. TRIVEDI:

Q. Agent Chupik, we just discussed a large stack of phone records.

A. Yes, ma'am.

Q. Have you had an opportunity to review those records?

A. Not each and every phone call, but in general, yes, ma'am.

Q. Now, based on those records, did you notice anything of interest?

A. There was contact between the confidential source's telephone number, (773) 386-6161, with Carlos Cruz, as well as contact between Carlos Cruz and Joel Perez, and as well as contact between Joel Perez and Alexander Vasquez beginning in the mid-afternoon of August 4th, 2005, at approximately the same time I had the confidential source first contact Cruz, through the time of the arrest on August 5th.

Q. So just to be clear, Agent Chupik, whose phones did you get the records for?

A. We got records for all the phones involved; (773) 386-6161, which is the confidential source's; (773) 865-4913, which is the cellphone used by Carlos; Cruz. Both telephones found next to or near where Perez was apprehended, (773) 310-0452 and (773) 910-0452; and as well as the phone recovered from the defendant, Alexander Vasquez, which is (773) 785-6969.

Q. Agent Chupik, did you work with a DEA intelligence analyst to analyze all those records?

A. Yes, ma'am, I did.

Q. What, if anything, did you see in those records? What themes?

A. Again. that there was contact amongst the defendant, Joel Perez, Carlos Cruz, and the confidential source beginning in mid-afternoon on August 4th and continuing up to the time of the arrest.

Q. You mentioned the mid-afternoon on August 4th through the

time of the arrest. Is that the time you were most interested in?

A. Yes, ma'am, because that's the first time we had the confidential source place a recorded phone call to Cruz to offer to sell them one kilogram of cocaine.

Q. Based on your analysis of the phone records, did you participate in the production of any documents?

A. Yes, ma'am.

Q. What documents were those?

A. We extracted the many records between August 4th and 5th that were made by all those phones and we extracted just the phone calls between the phones I previously described involving the confidential source, Cruz, Perez, and Vasquez.

MS. TRIVEDI: May I approach?

THE COURT: Yes.

BY MS. TRIVEDI:

Q. Agent Chupik, I'm handing you what's been marked as Government Exhibit Phone Summary.

A. Yes, ma'am.

Q. Have you had an opportunity to review it?

A. Yes, I have.

Q. Is that the chart that you participated in the creation of?

A. Yes, ma'am.

MS. TRIVEDI: The government moves for the admission

of Government Exhibit Phone Chart.

THE COURT: Under 1006, voluminous records?

MS. TRIVEDI: Yes, your Honor.

THE COURT: The underlying data are all the records previously entered into evidence directly and by stipulation?

MS. TRIVEDI: Yes, your Honor.

THE COURT: That's the foundation data?

MS. TRIVEDI: Yes.

THE COURT: Is there any objection?

MR. BRINDLEY: Your Honor, I have no objection to the admission of these documents for demonstrative purposes.

THE COURT: Can we have a side bar on this point?

MR. BRINDLEY: Yes.

(Proceedings heard at side bar:)

THE COURT: If the underlying data are received in evidence, as is the case here, and this is offered under 1006, voluminous records, the summary chart, that would be substantively admissible, not as illustrative or demonstrative given the nature of the underlying data here.

So if you say you have no objection that it go in as demonstrative, it doesn't deal with whether you have an objection as to its substantive value.

MR. BRINDLEY: I don't have an objection to that either now that you put it that way, your Honor.

THE COURT: All right. Because the check, the

foundation is that the underlying data are here in evidence and available to you. So the chart will go in substantively.

At the same time, because of its very nature, it is demonstrative and illustrative because you can see it in that sense, but it should be given its ordinary weight as hard evidence in the case as such.

MR. BRINDLEY: Thank you, your Honor.

MS. TRIVEDI: Your Honor, I will also ask for the admission of the DS phone records. I think I didn't specifically ask for those. So when we get back I can --

THE COURT: Certainly as a result of my earlier ruling and to be consistent with it, that also would go in and does make up a part of the underlying data which is in evidence and is otherwise available. I assume that in pretrial discovery these records were made available to defense counsel.

MS. TRIVEDI: Absolutely, and the stipulation related to those.

MR. BRINDLEY: Yes.

THE COURT: So all the checks have been made here and the chart is in under 1006.

MS. TRIVEDI: Thank you.

MR. BRINDLEY: Thank you.

(Proceedings heard in open court:)

THE COURT: Members of the jury, this exhibit is received in evidence and may be considered by you along with

all of the evidence in the case.

The underlying data with respect to the preparation of the summary has been received in evidence. It is in evidence and may be considered by you. This is a summary chart, one way to present voluminous evidence. You may take the chart as well as the underlying data into consideration as you decide the issues in the case.

You may proceed.

MS. TRIVEDI: Thank you, your Honor.

BY MS. TRIVEDI:

Q. And I'm also handing you Government Exhibit, Agent Chupik, Billing Records For (773) 386-6161 which you may have heard referred to in the stipulation.

A. Yes, ma'am.

These are telephone records for my confidential source telephone number.

MS. TRIVEDI: Your Honor, these records have been stipulated to and we would move for their admission.

THE COURT: They are received and may be considered by the jury.

(Government Exhibit Billing Records For (773) 386-6161 received in evidence.)

BY MS. TRIVEDI:

Q. Agent Chupik, before we publish the phone summary, I just want to talk for a second to you about your methodology.

When you were compiling the summary, what were the numbers that were of interest to you?

A. The confidential source's cellular telephone number, as well as the cellphone number of Carlos Cruz, as well as the two phones found near Perez at the time of the arrest, and finally, the phone number found -- corresponding with the phone found on Defendant Vasquez.

Q. So those were the phone numbers you focused on in compiling this chart?

A. Yes. Any other phone contacts between those phones -- in the overall phone records that did not pertain to these defendants, we excluded for easier visual reference.

Q. Agent Chupik, I'm now publishing Government Exhibit Phone Summary.

Agent Chupik, can you take a moment and walk the jury through what the four boxes are at the top of the page and what the colors signify.

A. The color green signifies a phone call between the confidential source and Cruz; yellow, phone contact between Cruz and Perez; white, Vasquez and Perez, a phone call between Vasquez and Perez; and then the -- I guess that's gray, Perez's phone number ending in 0452 and Perez's phone number ending in 0198.

Q. When you received the phone records and reviewed them, Agent Chupik, you heard earlier a stipulation about switch

transactions.

A. Yes, ma'am.

Q. Did you do anything with respect to switch transactions and time?

A. We adjusted all the phone toll records, the contacts to depict Central Standard Time from whatever time zone that the individual companies put it in.

Q. How many hours did you change the time on certain records?

A. I believe it was just Cruz's telephone records, which is T-Mobile is the carrier. They were three hours off from Central Standard Time.

Q. And then did you also deal with any cell tower or cell switch issues?

A. Yes, ma'am. For I know U.S. Cellular, if a person makes one telephone call, say, for example, they are driving down the interstate, they are going to use multiple cellphone towers or switches as they are traveling. Each time they go from one cellphone tower to another, U.S. Cellular records that as a brand new phone call, when in fact it has been one continuous call.

We took those multiple reported phone calls and consolidated them into what they actually were, which was one phone call.

Q. Would this reflect the time and group phone calls, is

that fair to say?

A. Yes, ma'am.

Q. And why did you do that?

A. Otherwise it would be very confusing. It would look like one phone call was actually two, three, four, five phone calls. It would get confusing after a while with all those multiple repeat entries, if you will.

Q. And when there were repeat entries that you combined, were those repeat entries in close proximity with one another?

A. Yes, ma'am, as well as the duration for each phone call.

Q. Can you now take a moment and walk the jury through the different columns.

A. The first column, call number, is just a sequential numbering of the phone calls we listed in the chart.

The second column, callers, refers to who was calling -- who was in contact with one another in each record.

The target phone number is the phone from which the -- that telephone call was drawn from, from initial toll records, the date and time, the date is obvious, the date of the call, and the adjusted time is the time -- approximate time of the phone call.

And then the final column, number dialed, is the phone number that was dialed by the target phone in column three.

Q. Agent Chupik, at about what time is the first call that's

listed on your chart?
A. August 4th, 2008 at approximately 4:26 p.m.
Q. And at about 4:26 p.m. on August 4th, 2008 what happened?
A. I instructed the confidential source to place his first recorded phone call to Cruz to provide him with a story about cocaine for sale.
Q. I apologize if I misheard you, Agent Chupik, but did you initially say August 4, 2006, when you meant August 4, 2008?
A. If I did say 2006, it was 2008, yes, ma'am.
Q. So looking at the first line on this chart, what does that tell you?
A. It's memorializing and reporting from the phone companies the actual recorded phone call we made between the source and Cruz.
Q. Were you with the source throughout parts of August 4th, 2008 and parts of August 5th, 2008?
A. Yes, ma'am, I was.
Q. Were there times when you were not with the source?
A. Yes, I was. There were times when he was not in my presence.
Q. And during those times, did you contact the source at times by your phone?
A. Yes, I did.
Q. Agent Chupik, what was your phone number you were using?
A. (312) 446-6820, that's my current cellphone number.

THE COURT REPORTER: Would you repeat the number, please.

THE WITNESS: Yes, ma'am. (312) 446-6820.

BY MS. TRIVEDI:

Q. Agent Chupik, you mentioned that you had the phone records for the confidential source for the two phones associated with Mr. Perez and for the phone associated with Mr. Vasquez.

A. Yes, ma'am.

Q. If there is a call, for example, between Mr. Perez and Mr. Vasquez, would that call ordinarily show up in both of their records?

A. It would. It would be a duplicate record; one depicted in one telephone toll and the second being depicted in the other telephone records, yes, ma'am.

Q. And the times that different companies use, in your experience are they always identical?

A. They are usually not identical. The time -- the time stamp from one telephone company to the next is usually different. It depends on the reporting method.

Q. When you were making the chart, did you look at all of that information and take it into account while you were compiling the chart?

A. Yes, ma'am.

Q. Moving on now from the phone records, Agent Chupik, to

the car that you saw in the Denny's parking lot to the Walmart and later at Arlington Heights Police Department.

A. Yes, ma'am.

Q. Did you learn what kind of car that was?

A. It was a Pontiac Bonneville, I believe a 1993.

Q. Was the car taken into custody?

A. It was.

Q. After the car was taken into custody, did you have any reason to search it?

A. Yes, ma'am. We believed that there were -- there was money somewhere. During the situation, the events that transpired, we searched the car for money.

Q. And during your search of the car, did you find anything?

A. Yes, I did.

Q. What did you find?

A. I discovered that the car contained a hidden compartment in the front dashboard area on the passenger side where the vehicle's airbag should have been.

Q. Was the airbag in fact there?

A. It was not.

Q. Did you find anything in that hidden compartment?

A. Yes, ma'am. We first tried to find the switch or how to activate and open the trap. After being unsuccessful, we pried the covering that goes over the airbag off the dashboard and discovered a large sum of United States currency inside.

Q. You mentioned the word "trap." What do you mean by the word "trap," Agent Chupik?
A. It's a hidden compartment that is installed in a car after it's completed by the manufacturer used to conceal contraband, narcotics, guns, money, et cetera.
Q. So inside the hidden compartment in the Bonneville you mentioned you found some money.
A. Yes, ma'am.
Q. What did it look like?
A. It was bundled up in rubber bands.
Q. And about -- what size was that bundle?
A. It was small enough that it could fit in my hand, but my hand was open completely.
Q. Was there anything else inside the trap?
A. No, ma'am.
Q. What did the inside of the hidden compartment look like in terms of texture?
A. There was plastic inside of it, as well as a cloth material lining it and towards the back.
Q. Did you also get a chance to look at the car generally?
A. Yes, ma'am.
Q. Did you notice anything to the outside of the car?
A. There was damage to the vehicle.
Q. After you looked at the inside and outside of the car, did you do anything with the money?

A. On August 6th I processed it at the DEA office here in Chicago and then subsequently took it to Brinks for counting.

MS. TRIVEDI: Your Honor, may I read a stipulation at this time?

THE COURT: Yes.

MS. TRIVEDI: Stipulation:

The United States of America, through Assistant United States Attorneys Steven Chahn Lee and Kruti Trivedi, and the defendant Alexander Vasquez, Jr. individually and through his attorney, Beau Brindley, hereby agree and stipulate that the following facts are true:

The United States currency that was found in the front passenger side dashboard of the Pontiac Bonneville on August 5, 2008 totaled $23,000.

BY MS. TRIVEDI:

Q. Agent Chupik, I may have missed this, but what did you do with the money after you took it to Brinks?

A. We have a pre-setup account with Brinks. Once they count it, it is electronically deposited into a government account maintained by the U.S. Marshals.

MS. TRIVEDI: Nothing further from the government, your Honor.

THE COURT: Of this witness?

MS. TRIVEDI: Of this witness.

THE COURT: Are you ready to cross examine, counsel?

MR. BRINDLEY: I am, your Honor.

THE COURT: Do you need about ten minutes?

MR. BRINDLEY: A ten-minute break would be great, your Honor. I appreciate it.

THE COURT: Members of the jury, about ten minutes, after which you will hear cross examination.

You may step down.

THE WITNESS: Thank you, your Honor.

(Recess.)

THE COURT: Ask the defendant to come in.

(Defendant in.)

(Jury in.)

THE CLERK: Court is in session. Please be seated.

THE COURT: You may proceed, counsel.

MR. BRINDLEY: Thank you, your Honor.

CROSS EXAMINATION

BY MR. BRINDLEY:

Q. Agent Chupik, I'd like to begin by talking about the phones and the phone records, which is how you ended your examination with the government.

Now, there were several cellular telephones collected into evidence on August the 5th, following the arrests, correct?

A. Four telephones, yes, sir.

Q. Okay. One of them was taken from Carlos Cruz, right?

A. That's correct.
Q. And then there were two cellular telephones that were found discarded on the ground in the immediate vicinity of where Joel Perez was arrested, right?
A. Yes, sir.
Q. It appeared that Joel Perez had discarded those phones, correct?
A. I was not there. I can't testify to that.
Q. All right. But they were found immediately next to him?
A. In a close proximity is my understanding, yes, sir.
Q. Those telephones, you said that you had looked at the subscriber information for the phones that were discarded on the ground, right?
A. Yes, sir, I did.
Q. And that subscriber information told you that these Perez phones had fictitious names, right?
A. That's correct.
Q. Meaning that he didn't put his own name on the phones, right?
A. Yes, sir.
Q. And people who are in the drug trafficking business in your experience often use fictitious names on their phones don't they?
A. Yes, sir.
Q. Now, when Alexander Vasquez was arrested a phone was

taken from him, right?
A. That is correct.
Q. That phone was not found discarded on the ground, was it?
A. It was not.
Q. It was on his person, correct?
A. My understanding, yes, sir
Q. That phone, you got subscriber information from Mr. Vasquez's phone, didn't you?
A. I did.
Q. That phone was registered in the name of him, Alexander Vasquez, correct?
A. Yes, sir.
Q. Now, you talked about examining these phone records and making the chart with an analyst, you remember that, correct?
A. Yes, sir.
Q. Now, when you began, what you said was that after you had examined the records and looked at the phones -- or I should say taken the phones into evidence, you determined that there was contacts between various people, right, phone contacts?
A. From the phone records, yes, sir.
Q. Okay. And what you determined was that beginning -- you said beginning in the late afternoon of August 5th there were contacts between the cooperating source and Carlos Cruz, right?
A. Incorrect. August 4th, 2008, yes, sir.
Q. I stand corrected. Right.

A. Yes, sir.
Q. It was late afternoon around 4:30, August 4th, right?
A. Approximately, yes, sir.
Q. And you said at that time there was the beginning of phone contacts between the cooperating source and Carlos Cruz, right?
A. Yes, sir.
Q. And you said starting around that late afternoon there were also phone contacts between Carlos Cruz and Joel Perez, right?
A. Later that evening, yes, sir.
Q. Okay. So there was never a telephone contact between Alexander Vasquez in any record and the cooperating source, was there?
A. There was not.
Q. And there was never any telephone contact between Alexander Vasquez and Carlos Cruz, was there?
A. There was not.
Q. Okay. And you said that there was, beginning that late afternoon of August 4th, 2008, there was telephone contact between Joel Perez and Alexander Vasquez, correct?
A. On August 4th, yes, sir.
Q. And you have reviewed the telephone records from that day from Mr. Perez's phone, correct?
A. Yes, sir.

Q. You reviewed them in enough detail to prepare this chart we looked at, correct?

A. That is correct.

MR. BRINDLEY: May I approach with one of the exhibits, your Honor?

THE COURT: Yes.

BY MR. BRINDLEY:

Q. Agent, I am going to show you what's been admitted as Government Exhibit Call Detail for (773) 910-0452.

That's this exhibit, correct?

A. That is correct.

Q. And this was one of the Perez phones, correct?

A. Yes, sir, it was.

Q. I'm going to direct your attention to a particular page in this exhibit. Specifically, I'm going to direct you to a record, an entry from August the 4th of 2008 at 10:31 a.m.

Now, at 10:31 a.m. on August the 4th, 2008, you would agree that according to these records Alexander Vasquez made a call to Joel Perez, right?

A. To one of the phones next to Joel Perez, correct.

Q. Okay. There was a call from the phone registered to Vasquez to one of the phones found near Perez, correct?

A. Yes, sir.

Q. That was at 10:30 in the morning, right?

A. 10:31 I believe it was, yes, sir.

Q. 10:31 and 48 seconds to be exact.

And, Agent, that was before the cooperating source had ever called Carlos Cruz about this deal, wasn't it?

A. That is incorrect.

Q. About the deal that you were setting up, the undercover deal, you said that started at 4:30 on the 4th, right?

A. There were other calls that I instructed the source to make the week prior to begin laying the groundwork for a potential purchase the following week.

Q. Okay. But the call that actually was made to set up the specific purchase that happened -- it was supposed to happen on the 5th, you said that was late afternoon August 4th, right?

A. The first recorded call, yes, sir.

Q. Okay. And Alexander Vasquez had called Joel Perez that morning before the cooperating source called him about that deal on the afternoon, right?

A. Yes, sir.

Q. So telephone contacts between Alexander Vasquez and Joel Perez did not begin late in the afternoon of August 4th, not really, did they?

A. They talked daily, no, sir, that's correct.

Q. That's right.

The facts -- or the phone records that you have examined actually showed you that Alexander Vasquez and Joel Perez were in telephone contact with each other regularly,

right?
A. Yes, sir. They were family. Makes sense.
Q. They were family, right?
A. Yes, sir.
Q. And you said it makes sense, right?
A. Absolutely.
Q. So August 5th, 2008, there was nothing unique about the fact that there was telephone contact between Perez and Vasquez, was there?
A. I can't say it was unique, no, sir.
Q. And the reason you can't say it was unique is because it happened all the time, right?
A. And I don't know what they talked about during those calls on August 5th.
Q. Precisely, that was my next question.
You don't know what they talked about during those calls, right?
A. I do not. They were not recorded.
Q. But there certainly were calls exchanged between these two people before this undercover deal started to get set up, right?
A. Yes, sir.
Q. And the calls that were made between Perez and Vasquez, you don't know whether they specifically talked about that deal during those calls or not, do you?

A. I do not.
Q. Now I want to refer your attention to what was admitted as this Government Summary Chart of the phone records you prepared.
MR. BRINDLEY: Can I approach, your Honor?
THE COURT: Yes.
MR. BRINDLEY: Thank you.
BY MR. BRINDLEY:
Q. I am showing you, Agent, the exhibit that was admitted.
This is the chart that you made, right?
A. Yes, sir. It looks like it, yes, sir.
Q. And in this chart you said that what you did was you had highlighted calls from certain people to other people, right?
A. Yes, sir.
Q. For example, you have highlights for the calls from the CS to Cruz, right?
A. That's correct.
Q. And then from Cruz to Perez?
A. And from Vasquez to Perez and Perez to Perez.
Q. And then because Perez has both phones, where he is actually calling his other phone, right?
A. That's right. So it was visually easier to look at, correct.
Q. Now I'm going to direct your attention to -- the whole thing started with the recorded call at 4:26 on the 4th, right?

A. Yes, sir.
Q. Okay. And then that was a call between this cooperating source and Carlos Cruz, right?
A. Yes, sir.
Q. Now, Carlos Cruz didn't call Joel Perez immediately after talking to the cooperating source, did he?
A. No, he did not.
Q. In fact, before Joel Perez talked to Carlos Cruz at all on August 4th, according to this chart, Alexander Vasquez actually called Perez, right?
A. Repeat the question. Who called who?
Q. Alexander Vasquez called Joel Perez before Cruz had even talked to him after 4:30, right?
A. Yes, sir.
Q. And at the time when Mr. Vasquez made his call, one of those was at 5:40 on August 4th, right?
A. Yes, sir.
Q. And that was before Carlos Cruz called Perez after talking to the source, right?
A. That is correct.
Q. And you don't have any evidence to suggest that Vasquez knew about the conversation between Cruz and the CS when he called --
MS. TRIVEDI: Objection.
THE COURT: Sustained. Form of the question.

BY MR. BRINDLEY:

Q. Mr. Perez eventually -- I'm sorry, Mr. Cruz eventually called Mr. Perez at 7:29 p.m., right?

A. Yes, sir.

Q. And that is after three calls had been made from --

A. Vasquez to Perez.

Q. -- Vasquez to Perez, right?

A. That is correct.

Q. And, Agent, there were no calls between Cruz and Perez after he talked to the cooperating source and before Vasquez called him, were there?

A. Say that again.

Q. That was kind of confusing.

We have the call from the cooperating source to Cruz at 4:26.

A. The one that I recorded, yes, sir.

Q. Okay. And then there were no calls from Cruz to Perez before Alexander Vasquez called Perez, were there?

A. That is correct. Not until three phone calls later at approximately 7:29 p.m.

Q. And it was then that Cruz called Perez, based on your investigation, to advise him of this deal, right?

MS. TRIVEDI: Objection. Misstates the evidence.

THE COURT: Overruled.

You may answer.

BY THE WITNESS:

A. Yes, sir, that's my understanding.

BY MR. BRINDLEY:

Q. Okay. And so that means that Vasquez had called him on the 4th before, it's your understanding; that Cruz even told him about the deal, right?

A. They spoke three times, according to these phone records, before Cruz contacted Perez.

Q. Okay. Now after Cruz had telephone contact with Perez, Perez made one call from one of the phones that was found near him to the other phone that was found near him, right?

A. Yes, sir.

Q. That was at 7:47 p.m.?

A. Correct.

Q. Cruz had called him at 7:31, right?

A. And 7:29, yes, sir.

Q. 7:29 and 7:31 are calls from Cruz to Perez, right?

A. Correct.

Q. Then at 7:47 Perez called his other phone, right?

A. Yes, sir.

Q. And you don't know what he was doing when he did that, right?

A. Right.

Q. And then there was no call from Perez to Alexander Vasquez immediately after he spoke to Cruz, was there?

A. Immediately after -- I can't see because your finger is in the way.
Q. I'm sorry.
A. That's all right. No, sir.
Q. In fact, the first contact between Perez and Vasquez after he talked to Cruz about this deal happened at 8:49 p.m., didn't it?
A. Yes, sir.
Q. And that was Vasquez calling Perez, right?
A. Yes, sir.
Q. But you don't have any records suggesting that Vasquez had talked to Cruz to find out about the deal before he made that call to Perez, right?
MS. TRIVEDI: Objection.
THE COURT: Sustained. Form of the question.
BY MR. BRINDLEY:
Q. You didn't see any phone records showing calls from Vasquez to Cruz or Cruz to Vasquez before Vasquez called Perez, right?
A. Vasquez and Cruz never spoke, no --
Q. That's right.
A. -- to my knowledge, yes, sir.
Q. Now, Agent, another thing that you said was that some of the calls that were in the phone records don't appear on this chart, isn't that right?

A. Yes, sir.
Q. And you said you removed some of those calls to make it more, I think visually accessible, or something like that, right?
A. It would be easier to read, that's correct.
Q. Easier to read. That's an easier way to say it, I understand.
Okay. So there were other calls that don't appear on your chart, right?
A. Yes, sir.
Q. Okay.
MR. BRINDLEY: May I approach the witness with an exhibit, your Honor?
THE COURT: Yes.
BY MR. BRINDLEY:
Q. Agent, this is the call detail that's been admitted into evidence for (773) 310-8098, right?
A. Yes, sir.
Q. And that was one of the Perez phones, correct?
A. Yes.
Q. I want to get you your call chart to we can make this as easy as possible.
MR. BRINDLEY: May I approach the witness again, your Honor?
THE COURT: Yes.

MR. BRINDLEY: Thank you.

BY MR. BRINDLEY:

Q. Now, I direct your attention here to -- on August the 5th, 2008, there is an entry at, let's see, 11:38 a.m. and 58 seconds, a call from Carlos Cruz to Joel Perez, right?

A. Actually, it looks like Perez calls Cruz, but yes, sir.

Q. Okay. I directed you to the wrong call.

There is a call from Perez to Cruz at 11:33 a.m., correct?

A. On August 5th, yes, sir.

Q. Okay. And you see that reflected here in the phone records as well, correct?

A. That is correct.

Q. All right. And then after that call that came through between Perez and Cruz at 11:33 a.m., Perez made a series of calls to other people, didn't he?

A. Yes, sir, he did.

Q. Okay. At 11:39 a.m. Carlos Cruz called somebody at the number (773) 837-2211, didn't he?

A. Yes, sir.

Q. So immediately after talking to Perez or shortly -- I should say shortly after talking to Cruz on the phone --

A. Approximately six minutes, yes, sir.

Q. Six minutes after getting on talking to Cruz on the phone -- and Cruz is the person he made the deal with, right?

A. Who made the deal with?
Q. Perez. The cocaine deal.
A. Yes, sir.
Q. So six minutes after talking to him, he called this number, 837-2211, right?
A. That's correct.
Q. Okay. Then two minutes later he called his own phone, correct?
A. Yes, sir.
Q. And he called it again, his own phone after that, correct?
A. 11:42, yes, sir.
Q. And so there is a series of calls after he speaks to Carlos Cruz that were not calls to Alexander Vasquez, right?
A. To my knowledge, that's correct.
Q. And you don't know who he was calling six minutes after he spoke to Cruz, do you?
A. I do not.
Q. And those calls, situations where he made calls to other people like that one, those don't appear on your chart, do they?
A. That is correct, because we don't know who is using those phones.
Q. Now, when your cooperating source, Mr. Diaz in this case, made the recorded call at 4:26 on August the 4th, that was a

call that was made to Carlos Cruz, that's correct, right?
A. Yes, sir.
Q. And the reason he was calling Cruz is because you had information -- I should rephrase that question. Let me withdraw that.
The reason you directed him to make a recorded call to Cruz was because your investigation led you to believe that Cruz would be a potential buyer for cocaine, right?
A. According to the CS, yes, sir.
Q. Now, the CS did not tell you at any time anything about Alexander Vasquez being a buyer of cocaine, did he?
A. That day, no, sir.
Q. Yes.
Prior to the events on August the 5th when the arrest happened, the CS never said anything to you about Alexander Vasquez, did he?
A. That's correct.
Q. Now, you said that the calls were -- the call at 4:26 was a recorded telephone call, correct?
A. Yes, sir.
Q. All right. And those calls -- that call has been translated into English since then, right?
A. To my understanding, yes, sir.
Q. And you are familiar with the contents of the call, right?

A. Generally, yes, sir.
Q. And you were discussing the events surrounding that call yesterday during your testimony, correct?
A. That's correct.
Q. Now, what you said during your testimony was that after the call with Diaz and Cruz it was your understanding that Cruz was going to contact his cocaine customers and then get back to Diaz about a deal, right?
A. Yes, sir.
Q. And I took special note and I wrote this down, you said "customers," plural, right?
A. Yes, sir.
Q. Okay. But the actual call that was made by Alejandro Diaz to Carlos Cruz, you know that during that call Cruz never mentioned more than one customer, did he?
A. I would have to review the transcript, but my testimony yesterday I'm sure is because I now know there are three subjects charged in this case.
Q. So that's why you said it yesterday?
A. That would have to be why, yes, sir.
Q. Let me show you a transcript of the call so we can refresh your memory of the content. If you would like to see it.

THE COURT: The call as such is not in evidence.

MR. BRINDLEY: I'm not going to admit it. I want to

be able to show it to him if you'll permit me.

THE COURT: There is no basis to cross examine on something not in evidence yet.

MR. BRINDLEY: Okay.

BY MR. BRINDLEY:

Q. Have you reviewed the transcripts of the call, Agent?

A. From August 4th, yes, sir.

Q. Okay. And if I showed you a copy of that call, transcript, would that refresh your memory about the content?

THE COURT: No, the call as such is not in evidence.

Does the government intend to offer that call at some point along the way?

MS. TRIVEDI: I need clarification as to what transcript.

MR. BRINDLEY: 4:25 p.m., the transcript in front of him here.

MS. TRIVEDI: Your Honor, we do intend to introduce that into evidence.

THE COURT: It is not in evidence yet, is that right?

MS. TRIVEDI: Yes.

THE COURT: Then there is no basis to cross examine with respect to something not in evidence. The inquiry is premature.

MR. BRINDLEY: Very well, your Honor.

THE COURT: I'm not asking for approval, counsel.

MR. BRINDLEY: I understand. I'm just saying to move on. That's my point. I understand what you are saying.

THE COURT: The "very well" is unnecessary.

MR. BRINDLEY: Certainly.

BY MR. BRINDLEY:

Q. Agent, what you said was that the reason you said "customers" yesterday was because you now know that there was more than two, right?

A. Yes, sir.

Q. Okay. Now, you actually prepared an affidavit in support of a complaint in this case previously, right?

A. Yes, sir.

MS. TRIVEDI: Objection.

THE COURT: Side bar, please.

MR. BRINDLEY: Sure.

(Proceedings heard at side bar:)

THE COURT: Okay. Where are you headed with this?

MR. BRINDLEY: Okay. He has now testified that the actual call only referred to one customer, being Joel Perez. He signed an affidavit in support of the complaint in which he --

THE COURT: The call -- as to the call itself it will speak for itself when it goes into evidence.

MR. BRINDLEY: Right.

THE COURT: Now, if it's in Spanish, obviously it's

not going to be played in Spanish to the jury. But assuming a foundation for the admission of the transcript of what was said, the words spoken between the speakers will speak for themselves.

So I don't know what you mean when you are going through the singular and the plural in terms of customer or customers. What's the point of it?

MR. BRINDLEY: The point is he signed an affidavit in support of the complaint in which he used quotation marks to quote a call and he used the word, plural, "customers," which isn't in the call, and that's an inconsistent statement, inconsistent with the call and the jury should be able to know that.

THE COURT: That's trivial. That's trivia. That's not significant in terms of prior inconsistent statement to use customers of a drug dealer, related drug dealer, or "customer," is trivial. It's not sufficient in terms of impeaching a prior inconsistent statement. It's not even enough to give to the jury.

There is an insufficient showing, the Court says, of the prior inconsistency to give to the jury. It's minutia. It's insignificant. It becomes a collateral issue.

MR. BRINDLEY: Okay. Your Honor, one other thing for the record. In the affidavit that I'm referencing, he actually quotes the call, using quotation marks, and it is not, that's

what I want to point out.

THE COURT: What I have said is if the -- if and when the transcript goes into evidence -- because the tape itself is in a foreign language -- it will say whatever it is it says. So if there is a misquote by the witness himself as to what is contained in the transcript, it is still in the nature of insignificant. It's minutia. It's a collateral issue, not enough even to bring to the attention of the jury in terms of a prior inconsistent statement.

But ultimately, if within the transcript the singular or plural are used, it's something the jury can deal with.

MR. BRINDLEY: Very well, your Honor. Thank you.

(Proceedings heard in open court:)

THE COURT: Proceed.

MR. BRINDLEY: Thank you, your Honor.

BY MR. BRINDLEY:

Q. Agent, it's true that during all of the calls that were monitored between Carlos Cruz and Alejandro Diaz you can't identify a single one in which Cruz ever mentioned more than one customer, that's true, isn't it?

A. That is correct, yes, sir.

Q. The only customer Cruz ever mentioned was Joel Perez, correct?

A. I'm sorry. Repeat that.

Q. Yeah.

The only -- on the calls the only customer that Cruz mentioned to this cooperating source was Mr. Joel Perez, correct?

MS. TRIVEDI: Objection.

THE COURT: Counsel, I have already ruled several times that there is no basis to cross examine with respect to what was said or not said during these recorded conversations because the recorded conversations are not in evidence.

MR. BRINDLEY: Your Honor, at this time the recordings are in evidence.

THE COURT: They are -- no.

MS. TRIVEDI: One recording.

THE COURT: The recordings are not in evidence.

MR. BRINDLEY: Then let me proceed on another matter, your Honor.

BY MR. BRINDLEY:

Q. Let me ask you this, Agent. When you set up the controlled purchase on August the 5th, it was your understanding and expectation that it would be a purchase between Carlos Cruz, the cooperating source, and Joel Perez, correct?

A. I had no idea who Joel Perez was. I only knew that Carlos Cruz was bringing at least one customer to the transaction.

Q. And when Mr. Cruz arrived at the Shell station on August

the 5th, surveillance was being done, wasn't it?
A. Yes, sir.
Q. And when Mr. Cruz arrived, he was seen driving in a car with one other person, wasn't he?
A. Joel Perez, yes, sir.
Q. And that one person, correct, was Joel Perez, right?
A. Yes, sir.
Q. And then it was Cruz and Perez who met with Alejandro Diaz, the cooperating source, near his car in the parking lot, wasn't it?
A. In the Shell parking lot?
Q. Yes.
A. Yes, sir.
Q. Alexander Vasquez was never seen participating in that conversation at the Shell, was he?
A. No, sir, he was not.
Q. And the content of that conversation between Diaz, Perez, and Carlos Cruz was recorded by your equipment, correct?
A. It was recorded, portions of it, yes, sir.
Q. Now, during the entire time that this transaction was going on, or this discussion was going on between Mr. Diaz, the cooperating source, and Mr. Perez and Mr. Cruz, Alejandro -- I'm sorry, Alexander Vasquez was never even seen getting out of his car, was he?
A. That's correct.

Q. Alexander Vasquez was never actually seen in the Shell parking lot, was he?
A. That's correct.
Q. And in all of the recording that you did in this case, you never heard any recording containing Mr. Vasquez's voice, correct?
A. That's correct.
Q. During the surveillance, Mr. Vasquez was never seen to handle any money, was he?
A. He was not.
Q. Never seen to access any trap compartment, was he?
A. He was not.
Q. And the fact is you never personally observed Mr. Vasquez break any law prior to trying to get away from the authorities you described yesterday, did you?

MS. TRIVEDI: Objection.

THE COURT: Sustained. Disregard the question.

BY MR. BRINDLEY:

Q. Now, you said that you noticed the black car as you were leaving, after you saw the CS leave, is that correct?
A. Yes, sir.
Q. That's when you first noticed it?
A. That's correct.
Q. And it was parked in the Denny's parking lot?
A. Yes, sir.

Q. Now, in terms of timing, this whole series of events didn't take very long at all, did it?
A. Not at all, no, sir.
Q. The cooperating source met with -- well, let me rephrase the question.
Mr. Cruz and Mr. Perez arrived at the Shell station at approximately 5:28 p.m., sounds right, doesn't it?
A. Approximately.
Q. And you gave the arrest signal at approximately 5:30, correct?
A. Approximately.
Q. So the whole thing lasted roughly five minutes or so, right?
A. Five to ten minutes max, yes, sir.
Q. Now, you did talk about the car, this black Bonneville, on direct examination. You said that car was analyzed or examined when it was in evidence?
A. I'm sorry. It was examined for what?
Q. The car was searched, right?
A. It was searched, yes, sir.
Q. And when it was searched, it was discovered that there was this void in the airbag, correct?
A. Yes, sir.
Q. And that's where the currency was found, right?
A. That is correct.

Q. And in order to place something in that compartment, people have to reach in there and put it inside, that's how it was set up, right?
A. That's correct.
Q. Mr. Vasquez's fingerprints were never identified inside the trap compartment, were they?
A. They were not.
Q. You said there were electrical wires leading to the trap compartment inside the car that were found, right?
A. I don't believe I said that, no, sir.
Q. So there weren't any wires?
A. I don't recall there being wires. But typically, yes, there is some sort of connection that leads to a switch. That's what we were looking for.
Q. And you never found Mr. Vasquez's fingerprints identified on any mechanism used to open the trap, did you?
A. We never found out how to open it, no, sir.
Q. So you don't possess any physical evidence showing that he did open it, do you?
A. No, I do not.
Q. You did not observe who drove that black Pontiac on August 5th before Alexander Vasquez did, did you?
A. I did not.
Q. Now, you said yesterday that this arrest order was given and then you described what happened.

You said that multiple officers converged on this Denny's parking lot, that's fair to say, right?

A. Yes, sir.

Q. And how many officers were there?

A. Again, on foot running from the Shell gas station into the Denny's lot, there was definitely six that I recall. And there were two Arlington Heights unmarked police cars that approached in the Denny's lot in vehicles. And then there was a black Chevy Trailblazer, which is a DEA unmarked police car.

Q. All right. So there is multiple cars.

How many officers, if you could estimate for me?

A. On foot or in cars?

Q. The ones in cars, did they get out?

A. Some of them may have. I know the two from the one vehicle, I remember seeing the passenger door open, the legs come out from underneath the door, and then when the black car backed up, he had to pull his feet back in the car and slam the door to void from being pinned.

Q. Okay. So then it's fair to say that there were multiple cars and multiple officers in the Denny's parking lot?

A. There were at least two agents or law enforcement in each car, yes, sir.

Q. You said that when the arrest order was given, where were you?

A. I was traveling northbound just in front -- along the

storefront of the Shell convenience store.

Q. And then you had to pull around back into the Denny's lot?

A. I didn't pull into the Denny's lot. I parked in the handicapped spot next to the Dodge Nitro in the Shell parking lot.

Q. So you pulled back into the Shell?

A. I was already in the Shell.

Q. You parked there, right?

A. At what time?

Q. The arrest order is given and then you parked there in the Shell station, right?

A. Yes, sir, I did.

Q. You parked your car and then you got out of the car, correct?

A. Yes, sir.

Q. And you began running towards the black vehicle, correct?

A. Yes, sir.

Q. And there were other -- and when you got out, you said that you heard sirens, right?

A. Yes, sir.

Q. You heard people yelling "police," right?

A. Yes, sir.

Q. Multiple people yelling "police"?

A. Yes, sir.

Q. And there must have been other officers too approaching the car on foot then, right?
A. As I testified to, six that I know of, yes, sir.
Q. Okay. Is that six counting you and your partner?
A. Yes, sir.
Q. The officers, these six, did they have their guns drawn as they approached?
A. Some of them did, yes, sir. I know my supervisor actually when he hit the car, his gun ended up on the ground. We had to recover it.
Q. Because he had it in his hand --
A. That's correct.
Q. -- and he dropped it when he fell?
A. Yes, sir.
Q. So we have all six police officers, some of them with guns drawn, coming toward this car, correct?
A. Yes, sir.
Q. And you know that at this point Alexander Vasquez was on parole, right?
MS. TRIVEDI: Objection.
THE COURT: You may answer.
BY THE WITNESS:
A. I didn't know Alexander Vasquez at that point.
BY MR. BRINDLEY:
Q. Today you know that he was on parole at that time?

A. Oh, yes, today I do. Yes, sir.
Q. So for somebody on parole, six police officers running up with guns, that's pretty scary, isn't it?
MS. TRIVEDI: Objection.
THE COURT: Calls for speculation. Sustained.
BY MR. BRINDLEY:
Q. And you said that you and your supervisor both ran for the vehicle, right?
A. Yes, sir.
Q. And your supervisor tripped over something that was on the ground, is that right?
A. That's correct.
Q. Okay And then what you said was he essentially head-butted the bumper of the car, is that right?
A. He fell face first into the hood of the car, yes, sir.
Q. So it was the hood of the car?
A. The hood, bumper area.
Q. He actually struck the vehicle, right?
A. Yes, sir.
Q. And at the point that he ran up and tripped and fell and struck the vehicle, the vehicle was still parked there, right?
A. Simultaneously, with GS Kirk Seeley striking the car, the car went in reverse.
Q. Okay. So before he hit the hood, it was parked, right?
A. It was not moving, correct.

Q. And in fact -- and so at that point you hadn't seen it move at all?
A. I had not, no.
Q. And so then you're saying that a police officer was able to get close enough to head-butt the hood of the car before he ever backed it up, right?
A. The car -- car went into reverse at the same time, yes, sir.
Q. So he was able to get close enough to hit it with his head before he backed it up, that's true, isn't it?
A. Yes, sir.
Q. Agent, if he was trying to run from this drug deal to get away --

MS. TRIVEDI: Objection.

BY MR. BRINDLEY:

Q. -- it didn't make much sense --

THE COURT: Sustained. Form of the question.

BY MR. BRINDLEY:

Q. Now, you said that there is these two cars that pulled in behind him, right?
A. Generally speaking, behind him, yes, sir.
Q. Okay.
A. And at angles.
Q. You made a diagram that we looked at yesterday with the little cars, right?

A. That's correct.
Q. And one of them, the Vasquez car was parked there and not moving, right?
A. When the police officers arrived --
Q. Yes.
A. -- yes, sir.
Q. And there is two police cars that pulled in behind him, right?
A. At angles, yes, sir.
Q. At angles. Like this (indicating)?
A. Like this (indicating).
Q. Okay. And these two police officers, they got close enough to make it apparent that they were going to execute a stop, right?
A. Yes, sir. They were getting out of their cars when the car went in reverse.
Q. So they stopped and they put their cars in park?
A. I can't tell you if they put their cars in park. The cars stopped and I saw the passenger of at least one of the them start to get out of the car.
Q. They are starting to get out, that suggests they probably were stopped, right?
A. Again, the only person that I saw get out was the passenger of the first vehicle.
Q. So at least one person then started to get out of one of

these cars, right?

A. That's correct, yes, sir.

Q. All right. So the cars are there and then after he started to get out or as he was starting to get out, that's when Mr. Vasquez put the car and you said spun it in reverse, right?

A. Yes, sir.

Q. And so before he ever put his car in reverse, these officers had enough time to pull in, stop, and start to get out, right?

A. It was essentially simultaneously. As the cars were pulling up, the black car went into reverse.

Q. Well, they definitely had enough time to get into the lot, right?

A. Yes, sir.

Q. And to get within a couple of feet of him?

A. Yes, sir.

Q. Of his car?

A. Correct.

Q. And stop, right?

A. Yes, sir.

Q. And he let all that happen before he put it in reverse?

A. It was a matter of just a couple of seconds.

Q. Okay. And then he took his car, which was at that point stopped, he spun it into reverse, and he backed into those

vehicles, right?
A. Yes, sir.
Q. And you just said those cars were a couple of feet behind his, right?
A. Not two feet, but within ten feet, within six feet.
Q. Less than a car length?
A. Yes, sir, definitely less than a car length, correct.
Q. And six feet.
And he hit those two stopped cars hard enough to move them out of the way, right?
A. What I recall, he didn't move them out of the way, he crashed into the first one and then backed into -- in between both cars. The police cars were somewhat parallel to one another. He backed in between them striking both of them.
Q. So he backed up, he backed into one of them and then he struck the other one as well, correct?
A. And he ended up in between, almost -- pretty much parallel to the two other cars.
Q. Well, since he started out at a full stop and he only got six feet back, he wasn't -- he wouldn't have been able to get the thing going very fast, would he?
A. No.
Q. Within six feet, even if he floored it, he is not going to be able to get up much momentum to move at all, is he?
A. He didn't have to. He backed in between the two cars,

striking them as he did.
Q. Okay. And those police vehicles that he struck, they were unmarked police vehicles, weren't they?
A. Yes, sir.
Q. And photographs were taken of the damage that was done to them, correct?
A. That is correct.
Q. And you have seen those photographs?
A. I have.
Q. All right.
MR. BRINDLEY: May I approach the witness, your Honor?
THE COURT: Side bar, please.
MR. BRINDLEY: Yes.
(Proceedings heard at side bar:)
THE COURT: This is the government's case in chief.
MR. BRINDLEY: Yes.
THE COURT: And the government has not offered the photographs in evidence.
MR. BRINDLEY: I don't want to offer into evidence.
THE COURT: But then you cannot cross examine with respect to photographs not in evidence.
MR. BRINDLEY: What I want to do is I want to cross examine him on the claim he has made about this accident by showing him these photographs. We can admit --

THE COURT: The photographs are not in evidence. In your case in chief, if you put one on, perhaps you can get the photographs in.

But this is the government's case in chief and they haven't offered the photographs. The photographs are not in evidence.

MR. BRINDLEY: Right.

THE COURT: And, therefore, you cannot cross examine with respect to exhibits not in evidence.

MR. BRINDLEY: I can't cross examine to lay the foundation to admit the evidence later, is that your Honor's ruling?

THE COURT: No. My ruling is that you cannot cross examine with respect to photographs not in evidence. That's the ruling. It's the government's case in chief. The photographs are not in evidence.

MR. BRINDLEY: All right. I can recall the agent. Thank you, your Honor.

(Proceedings heard in open court:)

BY MR. BRINDLEY:

Q. Agent, you said that you had observed the vehicles, correct, that were damaged, right?

A. I have only observed the photographs.

Q. Okay. And you have seen the damage, right?

A. Yes, sir.

Q. And the damage you observed -- one of the vehicles was damaged in the front right side, front right and front right side, correct?

A. Front right side and down the right, the passenger side, correct.

Q. The front right part of the vehicle and down the passenger side, right?

A. Yes, sir.

Q. And the other one was damaged along the left side, right?

A. From the front driver's side headlight down the driver's side, yes, sir.

Q. Okay. And that was the damage that was done when Mr. Vasquez backed into those cars as he was getting away, right?

A. He backed into them and then struck them going forward. Yes, sir.

Q. Now, after the collision happened, Mr. Vasquez's vehicle was taken into police custody, correct?

A. Yes, sir.

Q. Mr. Vasquez's vehicle was transported to a police impound lot, correct?

A. Yes, sir.

Q. Law enforcement never photographed where the damage occurred on Mr. Vasquez's vehicle, did they?

A. No, we did not.

Q. But that vehicle was located at the impound lot in Arlington Heights, wasn't it?
A. Yes, sir, it was.
Q. And you're aware that photographs of that vehicle were taken at the impound lot at Arlington Heights, aren't you?
A. Yes, sir.
Q. Have you seen those photographs that were taken?
A. I have.

MS. TRIVEDI: Objection. Relevance.

THE COURT: The answer may stand.

BY MR. BRINDLEY:

Q. No damage appears on the rear bumper of Alexander Vasquez's car at all, does it?
A. Not that I saw, no, sir.
Q. There was -- after he starts to back up, Agent, you said that you started running for the exit, is that right?
A. Towards the exit on to Algonquin, correct.
Q. Okay. So he is backing his car up, trying to get away, right?
A. Yes, sir.
Q. And you still had enough time on foot to beat him to the exit and get your gun out so you could point it at him as he is pulling out, is that what you said?
A. I said I ran towards the exit. I didn't make it all the way to the exit.

Q. Oh, you didn't make it to the exit.
A. I made to in front of the car.
Q. So you were able to get around in front of his car, right --
A. Yes, sir.
Q. -- before he got away?
Then he came towards you and you got out of the way of the car, is that correct?
A. That's correct.
Q. Now, as he was backing up and running into all these -- not all these, but these two police cars, these six officers who were on foot surrounded him, right?
A. Surrounding who?
Q. Surrounding the area, right?
A. They were focusing on Carlos Cruz, who was compliant. Some of them were focused on Carlos Cruz. Once I began running to get in front of the car, I can't tell you what they did after I ran.
Q. When you saw them as he started to back up, how many people were focused on Carlos Cruz?
A. I wasn't focused on them. I was focused on the car that was backing up.
Q. You were the only person that was focused on the car that was hitting police vehicles?
A. I'm sure there were quite a few probably focused on that.

Q. Okay. Despite all of the people who were probably focused on that, nobody made any attempt to shoot the tire of this vehicle, did they?
A. It's against DEA policy to shoot at a vehicle to stop it.
Q. Okay. So nobody did that, right?
A. No.
Q. As he was striking these vehicles, what was everybody else doing besides you, could you see?
A. I can't testify to what they were doing.
Q. Now, after Mr. Vasquez drove the Pontiac out of the lot, Agent, you said that the Pontiac was found in a Walmart parking lot, correct?
A. Yes, sir.
Q. But there was no foot chase with Mr. Vasquez, was there?
A. I was not there. I can't testify to that.
Q. You never observed any foot chase?
A. I did not observe one, no, sir.
Q. And you were not present when Mr. Vasquez was actually arrested, were you?
A. I was not.
Q. And, Agent, you also were not present, and I have never heard a recording, between Joel Perez and Alexander Vasquez before these events happened on the 5th, were you?
A. That's correct.
MS. TRIVEDI: Objection. Assumes facts not in

evidence.

THE COURT: The answer may stand.

BY MR. BRINDLEY:

Q. So, Agent, you don't know what Joel Perez told Alexander Vasquez was going to be going on there, do you?

A. I do not.

MR. BRINDLEY: One moment, your Honor.

THE COURT: Yes.

MR. BRINDLEY: Nothing else.

THE COURT: Redirect?

MS. TRIVEDI: Your Honor, may I have one moment?

THE COURT: Yes.

(Pause.)

REDIRECT EXAMINATION

BY MS. TRIVEDI:

Q. Agent Chupik, you have talked both on direct and on cross about August 4th, 2008 and how that was the beginning of the recorded phone conversations between your confidential source and Carlos Cruz, about the deal that was to happen the next day, is that correct?

A. Yes, ma'am.

Q. Mr. Brindley asked you a lot of questions talking about how the deal began on August 4th, 2008.

Agent Chupik, can you please let the jury know what the background was with respect to any conversations or

discussions prior to August 4th, 2008 that you instructed the CI to have with Carlos Cruz?

A. Yes, ma'am. During the week prior it was my decision as the controlling agent of the confidential source that he needed to move forward with anybody else he could assist us with.

So I instructed him to begin laying the groundwork, meaning call any potential customers who he believed might be interested in buying a kilogram of cocaine the following week. To my knowledge he did that, and then we began actually making recorded phone calls on August 4th.

Q. When you were referring to "beginning August 4th," what were you referring to, Agent Chupik?

A. The actual recorded phone calls and initiating the eventual meet and arrest that occurred August 5th.

Q. Agent Chupik, you also testified both on direct and on redirect the two Arlington Heights cars that pulled in behind Mr. Vasquez, did you have an opportunity to observe those cars as they were pulling in behind Mr. Vasquez?

A. As it transpired?

Q. Yes.

A. Yes, ma'am, I did.

Q. And did you have an opportunity to see whether or not their lights were on?

A. Lights were on, and again as I testified to before, there were other sirens going on, but there was a lot of screaming.

So I cannot tell you exactly which cars had their sirens on and which did not.

Q. Agent Chupik, you were asked questions about whether Carlos Cruz -- about the nature of the person that Carlos Cruz was going to bring to the people -- or the people that Carlos Cruz was going to bring to the deal.

Just to clear up any confusion on that point, what was your understanding as to -- I'm sorry, let me rephrase that rather than cause you more confusion with a bad question.

On August 4th, 2008, were you certain of who Carlos Cruz was going to bring to the deal?

A. We did not know, no.

Q. Did you in fact later in this investigation learn who arrived at the scene?

A. Yes, I did.

Q. And did both Joel Perez and Alexander Vasquez arrive at the scene of the deal?

A. Yes.

Q. On that day?

A. Yes, ma'am, they did.

Q. Agent Chupik, you testified on cross about the amount of time that the event took --

A. Yes, ma'am.

Q. -- at the Shell gas station and at the Denny's parking lot. Let's focus on the events at the Shell.

I believe you testified on cross as to certain times that people arrived and they left.

When -- roughly when did you give the arrest?

A. Approximately 5:30. Again, "approximately," because so many things were going on there was no way I could take notes, operate a police radio, cellphone, drive, make observations. So the times are approximate, yes, ma'am.

Q. And just to be clear on timing, so when you were first driving and you saw the source pull into the Shell lot and saw the two men, Perez and Cruz, outside the Nitro, that's -- take that as point one.

A. Okay.

Q. And point two is when you then had pulled into the Denny's parking lot and realized you were very close to Perez, Cruz, and the confidential source. About how much time had passed then?

A. Less than a minute.

Q. Then when you left at the Denny's, realizing that you were too close and moved over to the spot -- the handicapped spot that you testified to, about how much time passed then?

A. Maybe approximately 30 seconds.

Q. Then when you were the Denny's spot and watching, did you watch for some time?

A. Yes, I did.

Q. When I say "watch," I'm sorry, just to clarify, you were

watching the road to see if the confidential source was exiting?

A. That is correct.

Q. How much time passed before you saw the confidential source exit?

A. Approximately a minute.

Q. So a couple of minutes had passed within the whole time, between the time you saw the car and Cruz and Perez in the Shell lot and the time you saw the confidential source?

A. Yes, ma'am.

Q. Agent, are your recollections as to the times exact?

A. They are not.

Q. Why is that?

A. It's impossible to mark exact time. The clock in my car says one time, it's usually 10 or 11 minutes fast. My watch is five minutes fast, as well as I'm driving in rush-hour traffic in Arlington Heights, I'm working a police radio, I'm talking to confidential sources on the phone, and making observations and taking notes all at the same time.

So I have to approximate the times as it's going along while I'm multitasking.

Q. Agent Chupik, you also testified about opening up the secret compartment.

A. Yes, ma'am.

Q. Do you recall whether or not there were any wires?

A. Today I don't recall whether there were wires or not.
Q. So you don't know either way?
A. I don't know either way.
Q. You also testified on cross about damage to the Bonneville. Mr. Brindley asked you a very specific question about damage on part of the car, the bumper?
A. Correct.
Q. Did you notice damage anywhere on the car?
A. I did.
Q. Where did you notice damage?
A. The right rear fender around the tire.
Q. And in your head is that distinct from the bumper?
A. Yes, ma'am, it is.

MS. TRIVEDI: Nothing further from the government, your Honor.

THE COURT: Recross.

MR. BRINDLEY: Very briefly, your Honor.

RECROSS EXAMINATION

BY MR. BRINDLEY:

Q. You -- Agent, you talked about the time leading up to the actual recorded call and how this transpired a moment ago on direct examination -- redirect examination, correct?
A. Yes, sir.
Q. And during all the time leading up to this, no one reported anything to you about Alexander Vasquez, did they?

A. That is correct.

MS. TRIVEDI: Objection.

MR. BRINDLEY: Very good.

THE COURT: The answer may stand.

MR. BRINDLEY: Nothing else, your Honor.

THE COURT: All right.

You may step down, Agent.

THE WITNESS: Thank you, your Honor.

(Witness excused.)

THE COURT: Members of the jury. It's -- well, let's round this out and say please come back in one hour, but make it 1:30. Actually, that would be about 55 minutes, but that favors me and not you. All right. So come back at 1:30.

(Jury out.)

THE COURT: The jury has left the courtroom. Court is in session.

Who is the next witness?

MS. TRIVEDI: Your Honor, the next witness is Mr. Dunleavy. He is a relatively brief witness. After that, we anticipate Carlos Cruz.

THE COURT: Carlos Cruz after the next witness?

MS. TRIVEDI: After the next witness.

THE COURT: All right. And so it is.

MR. BRINDLEY: Thank you, your Honor.

THE COURT: 1:30.

MR. BRINDLEY: Yes.

(Proceedings recessed from 12:30 p.m. to 1:30 p.m.)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	08 CR 625
	)	
vs.	)	Chicago, Illinois
	)	August 26, 2009
ALEXANDER VASQUEZ,	)	1:30 p.m.
	)	
Defendant.	)	

VOLUME 2
TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE CHARLES R. NORGLE, SR.
AND A JURY

APPEARANCES:

For the Plaintiff:	OFFICE OF THE U.S. ATTORNEY 219 South Dearborn Street 5th Floor Chicago, Illinois 60604 BY: MR. STEPHEN CHAHN LEE MS. KRUTI TRIVEDI
For the Defendant:	LAW OFFICES OF BEAU B. BRINDLEY 53 West Jackson Boulevard Suite 1605 Chicago, Illinois 60604 BY: MR. BEAU B. BRINDLEY MS. BLAIR WESTOVER
Court Reporter:	MAELLEN E. PITTMAN Official Court Reporter 219 South Dearborn Street Room 2342 Chicago, Illinois 60604 (312) 435-5576

(Proceedings heard in open court. Jury out.)

THE COURT: What is the issue?

MS. TRIVEDI: Your Honor, we were just wondering how you would like us to proceed after Mr. Dunleavy testifies. He is a lay witness.

Mr. Cruz is currently in custody. He is currently in the witness room. There are agents with him. When he is to testify, how would you like it to go? Would you like to take a short break so the jury can go back in and then agents can bring Mr. Cruz and place him or how do you want to do it?

THE COURT: Well, certainly it will not come as any surprise that Mr. Cruz has entered a plea of guilty in this case.

MS. TRIVEDI: No. I'm thinking more in terms of potential safety issues or if the Court has any concerns. There will be agents in the courtroom.

THE COURT: None I am aware of. So I think he should come in routinely as any other witness would come in. You have already referred to him in your opening statement. The jury has heard a great deal about him already. I don't expect that anything out of the ordinary would happen. And so after the next witness, I will say please call your next witness, and you can simply call him to the witness stand.

MS. TRIVEDI: Okay. And would your Honor like to have an agent sitting by Mr. Cruz or do you think the

marshal -- how would you like to do that?

THE COURT: Maybe you are aware of things that I'm not aware of.

MS. TRIVEDI: Nothing with respect to Mr. Cruz personally, your Honor. We have no reason to believe there is any --

THE COURT: Well, I would leave that up to the marshals to determine whether the marshals should also sit on this side here. But is there something I'm not aware of?

MS. TRIVEDI: No, your Honor. I'm just asking for your preferences.

THE COURT: All right. So I don't envision anything extraordinary. We have two marshals right here in the courtroom and a CSO here. That should be more than enough and you also have a marshal or two outside, right?

MR. LEE: Agents.

THE COURT: DEA agents.

MR. LEE: Yes, your Honor.

THE COURT: As well as the case agent?

MR. LEE: Yes.

THE COURT: All right. And so the DEA agents can of course just sit simply in the courtroom. And if anything out of the ordinary were to happen, I think that would be more than enough in terms of security.

MS. TRIVEDI: Thank you, your Honor.

THE COURT: All right. If you are ready for the next witness, you may call that next witness.

You don't expect any problems from him, do you?

MS. TRIVEDI: I hope not.

MR. BRINDLEY: So do I.

THE COURT: Please ask the jury to come in.

THE CLERK: You can step on the witness stand.

(Jury in.)

THE CLERK: Court is in session. Please be seated.

THE COURT: Swear in the next witness, please.

THE CLERK: Please rise, raise your right hand.

(Witness sworn.)

THE COURT: Good afternoon, members of the jury.

You may proceed, counsel.

MS. TRIVEDI: Thank you, your Honor.

JOHN DUNLEAVY, PLAINTIFFS WITNESS, SWORN

DIRECT EXAMINATION

BY MS. TRIVEDI:

Q. Good afternoon.

A. Good afternoon.

Q. Can you please state and spell your name.

A. My name is John Dunleavy, J-O-H-N, Dunleavy, D-U-N-L-E-A-V Y.

Q. Mr. Dunleavy, are you currently employed?

A. I am.

Q. Where do you work?
A. Patrick Mechanical, Incorporated in Chicago.
Q. What is your formal job title?
A. Engineer.
Q. Are you currently living in the Chicago area as well?
A. I am.
Q. How long have you lived in Chicago?
A. 43 years.
Q. Mr. Dunleavy, drawing your attention to early May of 2008, were you looking to sell a car at that time?
A. Yes, I was.
Q. What kind of car were you looking to sell?
A. It was a 1993 Pontiac Bonneville SSEI.
Q. What color was it?
A. Black.
Q. Was it your own car?
A. It was.
Q. How long had you owned it?
A. I had bought it brand new in 1992.
Q. When did you start thinking you might want to sell it?
A. Approximately March of '08.
Q. Who did you buy the car from?
A. I bought it from Larry Faul Pontiac in Schaumburg.
Q. Is that a car dealership?
A. It is.

Q. When you bought the car, was it equipped with airbags?
A. As far as I know, yes, it was.
Q. After you bought the car, did you have any work done on it?
A. The only work that was done to the car was a CD changer was put in the trunk, an alarm system, and the windows were tinted.
Q. Did you have any work done on the airbags?
A. No, ma'am.
Q. Did you have any work done to the passenger side dashboard area?
A. No, I did not.
Q. Did you ever install any compartments inside the car?
A. No, I did not.
Q. Mr. Dunleavy, you mentioned that in the spring of '08 you had decided to sell the car.

In early May of '08, were you still looking to sell the car?
A. Yes, I was.
Q. And did someone eventually buy the car?
A. Yes, someone did buy the car.
Q. Who?
A. Two young gentlemen.
Q. What did they look like?
A. Medium complexion, black hair, one gentleman was a little

stockier in build. The younger -- what I deem as the younger gentleman was skinnier, maybe 160, 170 pounds.

Q. Did you know their names?

A. I -- I know one gentleman, I believe his name was Alex, the other one I think it started with a J. I'm not sure.

Q. How did you first come to talk to these two gentlemen?

A. They had called me on my cellphone asking if I had a car for sale. I said that I did. They said they would like to come look at it.

Q. What happened next?

A. We set an appointment to come look at the car. They looked at the car, checked it out, and then asked to drive it. And then they test-drove it, and at that point they decided to buy it.

Q. Did the two men, the one named Alex and the other one with the name you think starts with J, did they bring anyone else with them?

A. No, it was just them.

Q. And this was a year ago. Do you think if you saw them today you would be able to recognize them?

A. Possibly, yes.

Q. Can you look in the courtroom and see if there is anyone here that you recognize?

A. Possibly the gentlemen sitting by the table back there, but I'm not a hundred percent sure.

Q. Can you please state where that gentlemen would be at the table.
A. Behind the screen there sitting down.
Q. Can you clarify.
A. The man sitting right there (indicating).
Q. Now, the two --
THE COURT: I don't think the record is quite clear as to -- you can leave the stand and point to the person. You can leave the stand and point to the person.
BY THE WITNESS:
A. The man --
THE COURT: Step down. Please step down and if you see that person, you may walk towards him and point to him. Get as close as you need to get.
THE WITNESS: I can see him now. He is behind from the right. But I can't be 100 percent sure if he is one of them or not.
THE COURT: Could you walk over and point to the person to whom you are referring.
THE WITNESS: This -- the first gentleman I had seen here, but now that I see closer, I am not a hundred percent sure. I do recognize the gentleman in the glasses sitting there.
BY MS. TRIVEDI:
Q. Mr. Dunleavy, there are two gentlemen in glasses. Can

you please clarify which one?
A. The one sitting in the center.
Q. Just to be clear, now that you have had a chance to look at him up close, do you recognize him as the individual who came -- one of the individuals who came to look at the car?
A. I can't be a hundred percent sure.
Q. And do you recognize the person sitting at the table with the glasses?
A. He looks familiar, yes.
Q. Thank you, Mr. Dunleavy.
MS. TRIVEDI: If the record could reflect that Mr. Dunleavy has identified the defendant.
THE COURT: Yes.
BY MS. TRIVEDI:
Q. How much were you charging for the car, Mr. Dunleavy?
A. It was $4,000.
Q. And did you in fact make the sale to those two gentlemen?
A. I did.
Q. How much did they pay?
A. $4,000.
Q. Did you have any paperwork on hand?
A. Just the title.
Q. Who filled out the title?
A. Well, I filled in the odometer reading and signed it and one of the gentlemen signed it.

MS. TRIVEDI: Permission to approach, your Honor.

THE COURT: Yes.

BY MS. TRIVEDI:

Q. Mr. Dunleavy, I'm handing you what's been marked as Government Exhibit Title.

Have you had an opportunity to review it?

A. Yes. It is -- it is the title from the car.

MS. TRIVEDI: Your Honor, at this point the government would ask that the Government Exhibit Title be admitted.

MR. BRINDLEY: No objection, your Honor.

THE COURT: It is received and may be published to the jury.

(Government Exhibit Title received in evidence.)

BY MS. TRIVEDI:

Q. Mr. Dunleavy, if I could take that back.

Mr. Dunleavy, I'm publishing what has been marked as Government Exhibit Title.

Is this the title you had in your possession relating to the Bonneville?

A. Yes, it is.

Q. I have now displayed the second page of Government Exhibit Title.

Do you see at the top it says "Assignment of Title"?

A. Yes.

Q. Is this the section that you had the individuals that purchased your car fill out?
A. Yes. They -- I had them sign it after I filled in the odometer and signed it.
Q. To be clear, Mr. Dunleavy, what parts did you write on in that assignment of title section?
A. The odometer reading, the signature of seller, and the printed name of seller.
Q. And what was the date of the sale?
A. 5/8 of '08.
Q. Did one of the buyers then sign the title in front of you?
A. Yes, it was in front of me.
Q. Did you observe what name that buyer wrote?
A. I did not look at it closely, no.
Q. Were there -- was the person who signed the title a man?
A. Pardon?
Q. Was the person who signed the title a man?
A. Yes, it was a man.

MS. TRIVEDI: No further questions, your Honor.

THE COURT: You may cross examine.

MR. BRINDLEY: Thank you, your Honor.

CROSS EXAMINATION

BY MR. BRINDLEY:

Q. Mr. Dunleavy, you said it was in May of 2008 when you

sold the black Bonneville?
A. Yes, sir.
Q. Okay. And you said that two individuals came to look at the car together, right?
A. Correct.
Q. Okay. And you said that the man seated here at this table looks familiar to you, correct?
A. Yes.
Q. Are you certain that's the guy that came?
A. I'm -- I recognize him as one of the people that were there, yes.
Q. So he was one of the people who was there?
A. Yes.
Q. Okay. And you said the other guy's name, you thought it started with a J, right?
A. Yes, I don't remember.
Q. And the car was being sold for $4,000, correct?
A. Yes, sir.
Q. Now, the person gave you the $4,000, it wasn't this guy, was it?
A. It was the other gentleman, I believe.
Q. The other guy gave you the money, correct?
A. Yes, sir.
Q. And the other guy filled out the title paperwork, correct?

A. He is the one that signed it, I believe, yes.
Q. Okay. And if I could --
MR. BRINDLEY: May I approach the witness, your Honor?
THE COURT: Yes.
BY MR. BRINDLEY:
Q. Mr. Dunleavy, I'm showing you what's been admitted as Government Exhibit Title. I'm going to direct your attention to the second page.
Not this man but the other man who signed it and filled it out, this is the part that he filled out here on the second page, correct?
A. While I filled the odometer and my name in.
Q. And then he filled in the part up here above your name, correct?
A. Yes, I didn't write that.
Q. And that says "Marina Perez," correct?
A. Um-hum.
Q. Yes?
A. Yes, it does.
Q. When the two men came to see you, did they drive? Did they come in another vehicle?
A. I did not witness them coming in another vehicle.
Q. In other words, you don't know how they got there?
A. I'm not 100 percent sure.

Q. When they left, did both of them drive off in your car or do you know?
A. When they left?
Q. Yes.
A. I cannot be sure both of them left in the car.
Q. Okay. So the person that actually gave you the money and filled out the document, the other guy, after that day you don't know what he did with the car, do you?
A. No, sir.
Q. And this man sitting right here at the table, you don't know what kind of car he had that summer, do you?
A. No, I do not.

MR. BRINDLEY: I don't have anything else at this time, your Honor.

THE COURT: Redirect?

REDIRECT EXAMINATION

BY MS. TRIVEDI:

Q. Mr. Dunleavy, were both of the individuals looking at the car, the Bonneville?
A. Yes. When they were there, they were both looking at it.
Q. Were they both checking it out?
A. Yes.

MS. TRIVEDI: Nothing further from the government.

MR. BRINDLEY: Your Honor?

THE COURT: Yes.

MR. BRINDLEY: Very briefly.

RECROSS EXAMINATION

BY MR. BRINDLEY:

Q. But it's correct that only one of them gave you the money, right?

A. Yes, that is correct.

MR. BRINDLEY: Thank you. Nothing else.

MS. TRIVEDI: Nothing further from the government.

THE COURT: Thank you. You may step down.

(Witness excused.)

MR. LEE: The government calls Carlos Cruz.

THE COURT: Please raise your right hand.

(Witness sworn.)

CARLOS CRUZ, PLAINTIFF'S WITNESS, SWORN

DIRECT EXAMINATION

BY MR. LEE:

Q. Good afternoon.

Would you please state your name for the record.

A. Carlos A. Cruz.

Q. And could you spell your last name.

A. C-R-U-Z.

Q. How old are you?

A. 36.

Q. And where were you born?

A. Born in Puerto Rico.

Q. Did you at some point move to the Chicago area?
A. 2000.
Q. How far did you go in school?
A. High school.
Q. And where was that?
A. Puertó Rico.
Q. What is your native language?
A. Spanish.
Q. And how proficient are you at English?
A. Good.
THE COURT: Just a minute.
Mr. Cruz, can you get a little closer to the microphone there, please.
Thank you.
Proceed.
MR. LEE: Thank you, your Honor.
BY MR. LEE:
Q. Mr. Cruz, turning your attention to April 29th of this year, did you appear here in this courtroom before Judge Norgle that day?
A. Yes, sir.
Q. And at that time did you plead guilty in connection with this case?
A. Yes, sir.
Q. Could you please tell the jury in your own words what

your understanding is of what you pled guilty to?
A. I plead guilty to a conspiracy to intent to buy and distribution of a kilo of cocaine.
Q. Who did you participate in this drug conspiracy with?
A. With Joel Perez and Alex Vasquez.
Q. And did you enter into a plea agreement with the United States?
A. Yes, sir.
Q. What is your understanding of your obligation here in this courtroom under that plea agreement?
A. To cooperate and tell the truth.
Q. And what is your understanding of what you will get in exchange for doing that?
A. A reduce of the time.
Q. And about how much time are you expecting to receive?
A. 25 percent.
Q. Who will decide your ultimate sentence in this case?
A. The Judge.
Q. And before Judge Norgle sentences you, does the government -- has the government -- will the government do anything, assuming you cooperate?
A. The government will make a recommendation to the Judge.
Q. And what is your understanding of what the government will recommend?
A. As long as I cooperate and tell the truth to the Judge,

for whatever the Judge decides to give me the sentence.

Q. So has the government promised you anything about what your sentence will be?

A. No.

Q. And what is your understanding of what would happen to your plea agreement if you lied to the jury here as you testify in court?

A. Can be dropped.

Q. Excuse me?

A. Can be dropped.

Q. What do you mean?

A. Can be dismissed.

Q. I'm sorry?

A. Can be dropped or withdrawn.

Q. Do you mean your agreement will not go forward?

A. Yes.

Q. So that if you lie, the government would not make a recommendation?

A. Yes, sir.

Q. So in terms -- and in terms of whether or not you actually get this 25 percent off your sentence, who decides that?

A. The Judge.

Q. What are you hoping your sentence will be in this case?

A. That is up to the Judge.

Q. Do you have a hope?
A. 45 months.
Q. But as you sit here today, do you know what your sentence will be?
A. No, sir.
Q. Again, what is the only way you will get this deal in this case?
A. By cooperating and telling the truth.
Q. All right. Mr. Cruz, let me turn your attention to Joel Perez.

When did you first meet Joel Perez?

A. 2005.
Q. How would you describe your relationship with him?
A. As a friend.
Q. In the course of your friendship, did you have any discussions with Joel Perez about drug trafficking?
A. Yes.
Q. And in these discussions, did you discuss with Joel Perez your own involvement in drug trafficking?
A. Yes.
Q. Now, prior to meeting Joel Perez, had you been convicted of a drug trafficking crime?
A. Yes, sir.
Q. What was that crime?
A. Possession, manufacture. Manufacture and possession of

Ecstasy pills.

THE COURT: You say Ecstasy?

THE WITNESS: Yes.

THE COURT: Ecstasy.

BY MR. LEE:

Q. And when were you convicted of this crime?

A. Chicago.

Q. When were you convicted of this crime?

A. 2004.

Q. And just to be clear, where were you convicted?

A. Cook County.

Q. Now, after you first met Joel Perez in 2005, did you keep in contact with him?

A. Yes, sir.

Q. Turning your attention to early 2008, generally speaking, where were you living at that time?

A. Chicago.

Q. And were you working at that time?

A. Yes.

Q. What were you doing?

A. Was doing janitor and cleaning.

Q. And where were you working?

A. Evanston.

Q. Were you also doing any other kind of work?

A. Yeah. I was selling purses, sunglasses, and colognes on

the side.
Q. Were you also involved at that time with illegal drugs?
A. Yes.
Q. How so?
A. I was looking around to --
Q. Looking around for what?
A. For cocaine.
Q. And why were you looking around for cocaine?
A. To see who had a better quality of cocaine for my customers.
Q. Now you said that you were looking for better quality cocaine. What do you mean by that?
A. More pure.
Q. And what does it mean for cocaine to be more pure?
A. Don't be touched.
Q. And what is the significance of cocaine that's not been touched?
A. 95 percent, 90 percent pure.
Q. And is such cocaine more valuable than lower-quality cocaine?
A. Yes.
Q. Now, turning your attention to early August 2008.
Did you have conversations with Joel Perez around that time?
A. Yes.

Q. Now, how did you have -- how did you and Joel Perez contact each other?
A. By phone.
Q. What telephone number did you contact Joel Perez on?
A. He have two.
Q. Were there any distinction between these two phones?
A. I have him locked in my phone books as the house, that's his personal phone, and the other one as his work.
Q. Were these telephones -- do you know whether these telephones were landline telephones or cellular telephones?
A. Cellphones.
Q. And that's both of them?
A. Excuse me?
Q. That's both phones?
A. Yes, sir.
Q. Had you always tried reaching him on these phones?
A. Yes.
Q. When you called these telephone numbers, was it always Joel Perez who answered the calls?
A. Yes.
Q. Were there any exceptions?
A. One time. I called the other number and somebody else pick it up.
Q. Now in early August 2008, what telephone number did Joel Perez contact you on?

A. Excuse me?
Q. In early August 2008, what number did you use?
A. I contacted him in the one at the square house in my phone book.
Q. I'm not sure -- we may have misinterpreted each other.
In early August 2008, what was your telephone number?
A. In August?
Q. Yes.
A. (773) 845-4913.
Q. And what kind of phone was that?
A. Cellphone.
Q. Now in your conversation with Joel Perez in early August 2008, did Joel Perez ask you anything in connection with illegal drugs?
A. Yes.
Q. What did he ask you?
A. He told me to try to find somebody that got high-quality cocaine.
Q. And in your discussion with -- in your discussions with Joel Perez, did you discuss the quantity that Joel Perez was looking for?
A. Yes.
Q. And what was that?
A. He told me to try to get don't be no touch.
Q. I think we may have misheard each other.

Did he -- in your discussions with Joel Perez, did he say anything about the quantity, about the amount of cocaine that he was looking for?

A. A whole kilo of cocaine.

Q. Now, based on your experience, do people get a kilogram of cocaine for their own personal use?

A. No.

Q. Based on your experience, what do people get a kilogram of cocaine for?

A. Can be used about two different way.

Q. What are these ways?

A. You can get it -- you can get the kilo of cocaine pure, you can mix it and rerock it and do a kilo and a half.

Q. What does one do with it after rerocking it?

A. You can sell it in an amount or distribute it.

Q. All right. And is there another thing that one could do with a kilogram of cocaine?

A. Excuse me?

Q. What else could one do with a kilogram of cocaine?

A. Sell it in ounces and 3.5 eight-balls, 16s.

Q. You mentioned a few terms just now. What are those, 3.5 eight-balls?

A. Grams.

Q. Are those quantities of cocaine?

A. That's amounts a customer can ask you to buy from you.

Q. Now, I think you mentioned earlier something about discussion -- a discussion for the cocaine being untouched.

Just to be clear, was that a discussion about the quality of the cocaine that Joel Perez was looking for?

A. Yes.

Q. Now, based on your conversations with Joel Perez, what did you do?

A. I told him okay, let me get in touch with couple of my guys and I'll let you know.

Q. And so what did you do afterwards?

A. I called two of my sources and they don't pick their phone and I called one in particular.

Q. Who are you referring to now?

A. A friend of mine.

Q. What's his name?

A. Alex Diaz.

Q. How long have you known Alex Diaz?

A. From 2001.

Q. And did he know you by any nicknames?

A. Tony.

Q. Why did you call Alex Diaz?

A. Excuse me?

Q. Why did you call Alex Diaz at this time?

A. After I tried to call my other two sources, they don't pick their phone, I call him.

Q. Why did you call him?
A. Because I know he was involved too in cocaine deals.
Q. What did you say when you talked to him?
A. I told Alex Diaz, hey, you got something different that is in the street right now?
Q. And what were you referring when you said that?
A. To good cocaine, high quality.
Q. What did he say?
A. He said he don't have nothing at the moment, but he let me know.
Q. After your conversation with Alex Diaz, did you speak with Joel Perez?
A. Yes.
Q. What did you tell him?
A. I told Joel Perez that I talked to --
THE COURT: Counsel, can you lay a better foundation for this conversation and also the chronology so that the jury can pick up on this.
MR. LEE: Yes, your Honor.
BY MR. LEE:
Q. You were just referring to a telephone conversation that you had with Alex Diaz.
A. Yes.
Q. After that conversation with Alex Diaz, did you at some point contact Joel Perez?

A. Yeah.
Q. About when did you contact Joel Perez in connection -- in relation to your call with Alex Diaz?
A. Later, maybe half hour, then I call him.
Q. What did you discuss with Joel Perez in this call?
A. I told him that I try to call two persons and that each one answer my phone and I call a friend of mine named Alex and he say he don't got nothing now, but he let me know when he ready.
Q. And what, if anything, did Joel Perez say in response?
A. Okay.
Q. After this conversation with Joel Perez, did you talk at some point with Alex Diaz?
A. Yeah. Later he called me and he told me that he gonna be ready by Sunday or Monday.
Q. And so about when was that call in relation to your call that you were just describing with Joel Perez?
A. Excuse me? Repeat the question.
Q. About when was this call in relation to the call you were just describing with Joel Perez?
A. Yes.
Q. About how much time passed?
A. I think it was a day.
Q. And so what did you say -- and what did you say in response to Alex Diaz when he told you that he would be ready

on Sunday or Monday?

A. After he told me that, I finished talking to Alex Diaz, I called Joel Perez.

Q. What did you tell -- what did you discuss with Joel Perez?

A. I told Joel Perez that the guy that I told him before, Alex Diaz, he be ready about Sunday or Monday.

Q. Now, when you talked to Joel Perez, did you use the name Alex Diaz?

A. Alex.

Q. And why did you -- why just Alex?

A. Because I don't give out full names when referring to a customer and my source.

Q. And in your conversation with Joel Perez, did you use the word "cocaine" in that discussion?

A. We using sign language.

Q. What do you mean by "sign language"?

A. Meaning code language.

Q. So do you mean that you used words other than cocaine to refer to cocaine?

A. Yes.

Q. Why was that?

A. Because we talking on the phone.

Q. What were you hoping to accomplish by using -- were you hoping to accomplish by using different words?

A. Well, in referring to him in the phone about quality and better or good, that's when we using code language like wara, blond or good. We call it wara, blond or good, W-A-R-A.
Q. So what, if anything, did Joel Perez say in response?
A. He told me to make sure the quality be ascama.
Q. You just used the word "ascama." What word did you just use?
A. Ascama.
Q. Can you spell that?
A. A-S-C-A-M-A.
Q. Is that a Spanish term?
A. Yes.
Q. What does that term mean?
A. Ascama, mean like fish scale.
Q. And what do you mean by "fish scale"?
A. It's flaky, being untouched, it's shiny.
Q. So in this context, is that ascama a reference to the quality of cocaine?
A. Yes.
Q. And again, in terms of quality, what does the term "ascama" mean?
A. Good, pure.
Q. Now, in this call with Joel Perez, did you have discussion about price?
A. I told him that, he asked me and I said okay, let me call

Alex and I'll get you the price.

Q. Now turning your attention to the afternoon of August 4th, did you talk with Alex Diaz around that time?

A. Yes.

Q. Did you have a conversation following up on your prior discussions?

A. Excuse me?

Q. Did you have a discussion that was following up on your prior discussions?

A. Yes.

Q. What did Alex Diaz say in this call?

A. He told me that he was ready, to hurry up because it was going fast.

Q. What did you understand that to mean?

A. That I want to purchase the kilo of cocaine, to hurry up.

Q. Did you and Alex Diaz have a discussion about the price of the cocaine?

A. Yeah, I asked him what was the price.

Q. And what did he say?

A. 23.

Q. And what did you understand that to mean?

A. It was $23,000.

Q. And just to be clear, would that be $23,000 for a kilogram of cocaine?

A. Yes, sir.

Q. How did you end this call?
A. After he gave me the price, I told him if that's for your price, right? He said yes. I told him okay, let me call my guy and give him my price.
Q. Now, when you said -- you just said you referred to calling your guy. Did you use your guy's name?
A. No.
Q. And who were you referring to when you said "my guy"?
A. Joel Perez.
Q. And why didn't you use his name?
A. Because, like I say, it's -- I don't -- between source and customer, I don't mention name.
Q. Mr. Cruz, at some time before you came here to court today, did you learn that some of your telephone calls with Alex Diaz were recorded by the government?
A. Yes.
Q. And prior to your testifying here today, did you have a chance to listen to some of those calls?
A. Yes, sir.
Q. And when you did, did you recognize your voice?
A. Yes, sir.
Q. Did you recognize other people's voices as well?
A. Alex Diaz's voice.
MR. LEE: Your Honor, may I approach?
THE COURT: Proceed.

BY MR. LEE:

Q. Mr. Cruz, I'm handing you what has been previously marked and admitted as Government Exhibit Recording of August 4, 2008, Call.

Can you take a look at the exhibit.

A. Yes.

Q. Do you recognize it?

A. It's got my initials.

Q. Can you first describe for the jury what it is?

A. It is a CD having the conversation I had by phone with Alex Diaz.

Q. And this is the conversation we were just talking about?

A. Yes.

Q. You mentioned your initials.

Are your initials on the compact disk?

A. Yes.

Q. And what do those initials signify?

A. That I recognize my voice.

Q. And does it also signify that you listened to the recording on the CD?

A. Yes.

MR. LEE: May I have it back?

May I approach again, your Honor?

THE COURT: Yes.

BY MR. LEE:

Q. Mr. Cruz, I'm now handing you what has been previously marked Government Exhibit Transcript of August 4th, 2008, Call.

Can you take a look at it and tell me if you recognize this?

A. Yes.

Q. What is it?

A. It is the transcript of the conversation I have on the phone with Alex Diaz.

Q. And is this the conversation we were just talking about?

A. Yes.

Q. And is this the conversation that was on the compact disk that I just showed you?

A. Yes.

Q. Looking at the first page of the exhibit, do you recognize your handwriting?

A. Yes.

Q. What is that?

A. My initials.

Q. What do those signify?

A. Signify that I recognize the voice and the transcript is right.

MR. LEE: Your Honor, the government would move for admission of Government Exhibit Transcript of August 4th, 2008, Call.

THE COURT: When you had the conversation, in what

language was the conversation?

THE WITNESS: Spanish.

THE COURT: In looking at the transcript, in what language is the transcript?

THE WITNESS: It's in English.

MR. LEE: We have a stipulation about this.

THE COURT: All right. What is the stipulation?

MR. LEE: Let me get that, your Honor.

The stipulation also referred to another exhibit, set of exhibits I will refer to later, but I will just read them also all.

THE COURT: Very well, proceed.

MR. LEE: The United States of America, through Assistant United States Attorneys Stephen Chahn Lee and Kruti Trivedi, and defendant Alexander Vasquez, Jr., individually and through his attorney, Beau Brindley, hereby agree and stipulate that the following facts are true:

Each of the recordings contained on Government Exhibits Recording of August 4th, 2008, Call and Recording of August 5th, 2008, Meeting are true and accurate conversations recorded by the Drug Enforcement Administration's confidential source in this matter at the dates and times indicated on Government Exhibits Transcript of August 4th, 2008, Call and Transcript of August 5th, 2008, Meeting.

Each of the recordings contained on Government

Exhibits Recording of August 4th, 2008, Call and Recording of August 5th, 2008, Meeting accurately reproduces both the words spoken and the sounds of the speakers' voices as those words were spoken and as those sounds occurred in the original conversations reproduced in each of the recordings.

Government Exhibits Transcript of August 4th, 2008, Call and Transcript of August 5th, 2008, Meeting are accurate transcripts of those portions of Government Exhibits Recording of August 4th, 2008, Call and Recording of August 5th, 2008, Meeting were in the English language and are accurate translations of those portions of the recorded conversations that were in the Spanish language and accurately identify the speakers in those conversations.

THE COURT: All right. That is the stipulation?

MR. BRINDLEY: That is the stipulation, your Honor.

MR. LEE: Yes, your Honor.

THE COURT: All right. You may proceed.

MR. LEE: So at this point the government would move for admission for Government Exhibit Transcript of August 4th, 2008.

MR. BRINDLEY: There is no objection.

THE COURT: All right. Transcripts are received as identified.

MR. LEE: And may be published to the jury?

THE COURT: Yes.

MR. LEE: Yes.

(Government Exhibits Government Exhibit Recording of August 4, 2008, Government Exhibit Transcript of August 4th, 2008, Call, Government Exhibits Recording of August 4th, 2008, Call and Recording of August 5th, 2008, Meeting received in evidence.)

BY MR. LEE:

Q. I'm showing you on the screen what's been -- the first page of Government Exhibit Transcript of August 4th, 2008, Call.

Mr. Cruz, you just referred to some initials. Can you identify those for the jury.

A. Excuse me?

Q. You just referred a little while ago to some initials that you wrote on the first page of this exhibit.

A. Yes.

Q. Can you just again -- can you state what those initials signify?

A. My name, and relates the recording and the voice in the CD.

MR. LEE: Your Honor, the government would like to now publish the exhibit to the jury and read -- have the transcript read into the record.

THE COURT: You may proceed.

MR. LEE: May I have Mr. Cruz read his parts of the

conversation and ask the case agent to read the parts of the confidential source?

THE COURT: All right. You may do so.

Now, members of the jury, the agent will in effect play the role of the confidential informant, but he will only read. He will not use voice inflection or tone or act out the role. He will simply read the words straight out. I hope you understand that.

All right. Proceed.

MR. LEE: Yes. And just for the record I will -- there is some notations in the transcript which I will say. There is inaudible portions. I will just say for the record where they are.

MR. BRINDLEY: Your Honor, I would object as the transcript speaks for itself.

THE COURT: Side bar, please.

MR. BRINDLEY: Yes.

(Proceedings heard at side bar:)

THE COURT: Yes, the transcript speaks for itself, but we need the speaker under these circumstances to speak it out, to say the words audibly so that the jury can hear it, in that sense to aid the jury in understanding what is being said between the parties to the conversation.

And I have told the jury that the speaker, in this instance the DEA agent, is only going to say the words; that he

is not, indeed, the actual speaker, Mr. Diaz is the actual speaker. So since he is speaking the words of the transcript, yes, it speaks for itself to a certain extent, but to make it audible in terms of presentation, this is not an unusual technique.

MR. BRINDLEY: Your Honor --

THE COURT: Now, we haven't brought in Brad Pitt or someone else to play the role. So it is only the matter of presentation and I think the jury understands that.

MR. BRINDLEY: Your Honor, I don't have any objection to explaining the terms in there, if that's what Mr. Cruz needs to do. But it seems to me just repeating testimony to have it read aloud, I don't see what's added to it if there is no inflection involved.

THE COURT: The one thing we do not want is inflection.

MR. BRINDLEY: Okay.

THE COURT: All right. So we are simply saying in the presentation the words will be spoken by someone who happens to be a DEA agent. It could be anybody who would come in and just say the words.

And at the time these words are being said, is it the government's objective to project the transcript on the screen?

MR. LEE: Yes, your Honor.

THE COURT: So the jury will have it both ways. I

think it's clear what we are doing here.

MR. LEE: Yes, your Honor.

THE COURT: All right.

(Proceedings heard in open court:)

BY MR. LEE:

Q. Mr. Cruz, will you read your portions of the transcript and the DEA agent will read the portions of the CS.

I will read some notations in the transcript.

The transcript begins with the telephone ringing.

THE WITNESS: Hello.

MR. LEE: What's up, Tony.

THE WITNESS: What's up, Dude.

MR. LEE: What you doing.

THE WITNESS: Here working hard.

MR. LEE: What was I going to tell you.

THE WITNESS: What happened.

MR. LEE: May the record reflect at this point the transcript reflects that there is some static, some inaudible conversation, and there is several persons speaking in the background.

THE COURT: Proceed.

THE WITNESS: Fine, well a -- but in fact --

MR. LEE: And there is a portion of some unidentified female speaking.

MR. LEE: No, it's real pretty, it's --

MR. LEE: And the transcript reflects an inaudible on the transcript.

THE WITNESS: Let me call. What was the number?

MR. LEE: It's 23 dollars.

THE WITNESS: For you, right.

MR. LEE: For mine.

THE WITNESS: Okay, is fine.

MR. LEE: And here in the transcript, several voices overlap.

MR. LEE: Hurry up, because you know how he gets.

THE WITNESS: I'm in south right now.

MR. LEE: The man has a lot of work.

MR. LEE: And the transcript reflects some static here.

THE WITNESS: No, I am in south, let me call for mine to give him the number that I'm going to give him, and if he say yes, well, I'll see you later on tonight.

MR. LEE: Okay. He -- he lives in Arlington Heights just a bit -- little bit farther from where I live. He lives on Arlington and that's where he has the tools. So get ready for that, Arlington and more or less by Touhy.

MR. LEE: And the transcript reflects that the voices overlap here.

THE WITNESS: Arlington and what.

MR. LEE: And Touhy going north.

THE WITNESS: Oh, over there, going north.
MR. LEE: Yeah, you know, more or less where Arlington and Touhy are, right.
THE WITNESS: Yeah, it's over here near my house.
MR. LEE: You live around there.
THE WITNESS: I live north over there too.
MR. LEE: Oh, okay.
MR. LEE: And the transcript reflects voices overlap.
THE WITNESS: By.
MR. LEE: Arlington is west of River Road.
THE WITNESS: I know it's by Des Plaines.
MR. LEE: Yeah, it's --
THE WITNESS: Over there.
MR. LEE: Okay. So let me see, those -- those deals will be done there.
THE WITNESS: Fine. So anyway, is mine, is gonna be done. Let me call this dude.
MR. LEE: All right, then.
MR. LEE: And the transcript reflects this is the end of the call.
BY MR. LEE:
Q. Mr. Cruz, at the end of this call you refer to how you were going to call "this dude."
Who were you referring to?
A. Joel Perez.

Q. And again, why did you not use his name?
A. Because between my source and my customer, I don't mention the full name.
Q. What did you do after this telephone call?
A. Call Joel Perez.
Q. Did you reach him?
A. Yes.
Q. And what did you -- what was your discussion?
A. I told him that he's ready. He got what he want, and the price was 24.
Q. What did Joel Perez say about that?
A. He complained about the price.
Q. What did he say?
A. He say way too high.
Q. How did you respond?
A. I told him you want high-quality cocaine.
Q. Then what?
A. Huh?
Q. You said if you want high-quality cocaine.
A. That's the price.
Q. How did you end this call with Joel Perez?
A. He told me okay.
Q. What was the plan by the time you finished this call with Joel Perez?
A. The plan was go, check that the cocaine was really fish

scale like Alex Diaz was saying, and he was right about the pure and the quality of the cocaine. I told Perez don't bring no money, and if it's good, we come back and get the money and go buy the kilo of cocaine.

Q. Just to be clear, was the plan to go meet with Alex Diaz first without money?

A. Yes.

Q. Check out the cocaine and if so, go get the money and bring it back?

A. Yes.

Q. Why not bring the money?

A. Excuse me?

Q. Why did you not want to bring the money with you?

A. Because it was hard to believe it was high-quality cocaine like Alex Diaz was telling me because before I call Alex Diaz, I already know that in the street was not the amount of cocaine like that that Perez was looking for.

Q. Now I turn your attention to the next morning, August 5th. Did you have any conversation that morning following up your discussions of the previous day?

A. Yes, I received a phone call from Alex Diaz.

Q. Where were you at this time?

A. My work.

Q. And was this the work in Evanston?

A. Yes, sir.

Q. What did Alex Diaz say?
A. He asked me that I was ready.
Q. What did you understand that to mean?
A. That I was ready to make the deal.
Q. How did you respond?
A. I said let me call this dude.
Q. And again, when you said "this dude," who were you referring to?
A. Joel Perez.
Q. After you called Alex Diaz, what did you do?
A. I finished the phone call with Alex Diaz. I wait a couple minutes and I call Joel Perez.
Q. Did you reach him?
A. Yes.
Q. What did you tell Joel Perez?
A. I said look, this dude just call me, he said if I was ready.
Q. How did Joel Perez respond?
A. He told me he was going to the mall with his family.
Q. How did you respond?
A. I said well, let me know what time because he just waiting for me to call him back to see what time we are going to get done that deal.
Q. Later that morning did you have another conversation with Joel Perez?

A. Yes.
Q. What did you say in this conversation?
A. He is saying that I can make my guy bring the kilo of cocaine to Chicago.
Q. Can you that say again just to be clear?
A. He asked me that I can bring the kilo of cocaine to Chicago.
Q. And how did you respond?
A. I say let me call him and ask him.
Q. What did you do after that call?
A. I call Alex Diaz and he told me that his supplier, he don't want to take nothing out of the place.
Q. And what did you do after that call?
A. I called Perez.
Q. And what did you tell him?
A. I say look, we have to go out to Arlington Heights.
Q. And how did he respond to that?
A. He was kind of mad.
Q. And did he say anything about how this might affect the deal.
A. Yeah, he said just tell him forget it.
Q. And what did you understand that to mean?
A. To forget about the deal.
Q. So would the deal be off?
A. Yes.

Q. So after this call, what did you do?
A. I call Alex Diaz.
Q. And how soon after your call with Joel Perez did you call Alex Diaz?
A. As soon as I finish with Joel Perez, I call Alex Diaz.
Q. What did you tell Alex Diaz?
A. I told Alex Diaz to forget about the deal.
Q. After you called Alex Diaz, what happened?
A. After I finish calling Alex Diaz, I was working. In like five, ten minutes Perez call me back again.
Q. And what did Perez say in this call?
A. He told me, tell your guy the deal is going on back.
Q. What did you understand that to mean?
A. To call my guy and tell him the deal was on.
Q. After this call, what did you do?
A. I told Perez well, it have to be after I get off my job.
Q. So at this point was the plan to do the deal later that same day?
A. Yes, sir.
Q. And it would be August 5th?
A. Yes.
Q. So after this call with Joel Perez, what did you do?
A. Well, I call Alex Diaz and told him the deal was on back, and I have to be -- to wait until I got off from my work.
Q. Later that day, August 5th, did you meet in person with

Joel Perez?
A. Yes, sir.
Q. Where did you meet him?
A. By Irving Park and Harlem.
Q. Is that in Chicago?
A. Yes.
Q. Why did you meet him there?
A. Because that's the address Perez gave to me.
Q. How did he give the address to you?
A. By phone.
Q. When did he give this address to you?
A. When I was on the phone.
Q. What conversation are you talking about now?
A. When I was in my apartment, he called me and he told me that "What happened is this guy just called me and I told him that I was going to pick you up."
Q. Okay. Just to be clear a little bit, you said you were back in your apartment.
A. Um-hum.
Q. So was this after you had finished work?
A. Yes.
Q. And then you had a call with Joel Perez?
A. Yes.
Q. And what did he tell you in this conversation?
A. He told me to go pick him up near by Irving Park and

Harlem.

Q. And you know that area?

A. Yes, sir.

Q. How did you get there?

A. By car.

Q. What kind of car did you have?

A. A Nitro 2007.

Q. And as you were going to that area -- how long did it take you to get there?

A. It was rush time.

Q. So about how long?

A. I stop for some gas, Joel Perez called me again and told me where I was. I said I'm pumping gas right now and it's traffic.

Q. Just to be clear, what color was your car?

A. Silver gray.

Q. So where did you see -- where did you meet -- again, where did you meet Joel Perez?

A. I meet him near Irving Park and Harlem in a place, it was a Baskin-Robbins or fast food.

Q. And when you saw him, where was he?

A. He was walking from that place.

Q. And what happened when you met?

A. When he went to my truck, before he get in, I told him you got no money on you, right? He said no.

Q. You told him -- you mean you asked him a question?
A. Yes.
Q. And how did he respond?
A. "No, I don't got no money on me."
Q. Why did you ask him that?
A. Because before I asked him don't bring no money, don't bring nobody else.

MR. LEE: Your Honor, could we have a brief side bar?

THE COURT: Yes.

(Proceedings heard at side bar:)

MR. LEE: Your Honor, we just noticed -- we just noticed one of the jurors appears to be sleeping. So apparently my request for a side bar apparently woke her up. We were thinking the jury might need a break.

THE COURT: You resolved your own problem. You have to speak a little louder and that will keep her awake. But I didn't notice that she may have dozed off.

But what we'll do right now, however, to accentuate the point, I will announce to the jury a seventh-inning stretch, and we will all stand up and stretch. So that should care take of your problem.

MR. LEE: And I will speak louder, your Honor.

(Proceedings heard in open court:)

THE COURT: Members of the jury, since we want to move this matter along rather than take a break as such, we

will take a seventh-inning stretch. So everybody up and stretch if you want to.

But if any of you do actually need a break, raise your hand and you will be acknowledged.

(Pause.)

THE COURT: Please proceed.

MR. LEE: Thank you, your Honor.

BY MR. LEE:

Q. Mr. Cruz, before we continue where we left off, can we just go back a little bit to cover a few quick points.

You mentioned earlier that you had a call with Mr. Diaz in the afternoon of August 4th and that you later had a telephone call with Joel Perez.

About how much time was there between those two calls?

A. What point are you talking about? In the afternoon?

Q. On August 4th, the day before the date we were just talking about, you mentioned how you had a conversation with Alex Diaz in the afternoon and we went through the transcript of that call.

And there was also -- you also talked about a call that you had with Joel Perez later that day. About how much time was there between those two calls?

A. In the afternoon? I was doing something, I wait an hour, half hour, then I call him.

Q. So it wasn't immediate -- immediately following each other?
A. No.
Q. And where were you when you were talking with Alex Diaz that afternoon?
A. What date?
Q. In the call that we looked at the transcript for.
A. I was in south.
Q. Where were you in particular?
A. I was inside the truck.
Q. And where were you going to?
A. I was in south, Manhattan, Illinois. I was going back to Chicago.
Q. Were there any people with you?
A. Yes. I have a girlfriend and a little kid in the back of the truck.
Q. So at the time of that call in the afternoon, you were in a car with some other people?
A. Yes.
Q. And where were you when you had your call with Joel Perez later that day?
A. Driving.
Q. You were still driving?
A. Yes.
Q. And you mentioned your telephone number, which I believe

was (773) 845-4913?
A. Yes.
Q. Who is that telephone registered to?
A. To my name.
Q. So it's registered to Carlos Cruz?
A. Yes.
Q. All right. Now, let me -- and so why didn't you -- so why did you not call Perez back immediately after you had that call in the afternoon with Alex Diaz?
A. Because I was on my way to Chicago and I was with my girlfriend and the kid in the car and I was heading back driving say, you know, he already told me what I was looking for.
Q. So when you talked with Joel Perez, were the conditions different by that point?
A. Yeah.
Q. So were you by yourself at that point?
A. That afternoon, no, I just right there with them.
Q. When you talked later that day with Joel Perez, were you by yourself?
A. You talking about the afternoon of the 4th?
Q. Yes.
A. No, I was still with the female and the kid in the car.
Q. At both times when you talked with Mr. Diaz --
A. Yes.

Q. -- and when you talked with Mr. Perez?
A. Yes.
Q. All right. Turning back to the afternoon of August 5th, when you met Mr. Perez around Irving Park and Harlem, did you have a discussion with him about the deal?
A. Yes.
Q. What did you say?
A. I told him, look, let's see if it's true what he say, it's good and fish scale and pure like he say. We go down there, we look at it, if it's good, we come back, get the money, and go back and buy the kilo of cocaine.
Q. And how did Mr. Perez respond?
A. He said okay.
Q. So what did you do then?
A. After what?
Q. After you left, what did you do?
A. Oh, after he pick him up, I call Alex Diaz.
Q. Where were you at this point?
A. I'm in the car.
Q. Which way are you going?
A. I'm on the road heading -- trying to look for a exit to I-90.
Q. So what did you do at that point?
A. At this point I call Alex Diaz, I said look, I got my cousin with me, give me direction where I'm going.

Q. What did he say?
A. He said you have to come to Arlington Heights, try to get the I-90 and start heading that way.
Q. Did you then get on I-90?
A. Yes, sir.
Q. Did you go towards Arlington Heights?
A. Yes, sir.
Q. While you were en route, did you have any further conversations with Alex Diaz?
A. Yes.
Q. How did you do so?
A. Excuse me?
Q. How did you have conversation with Alex Diaz?
A. By phone.
Q. And what did you and Alex Diaz discuss?
A. How to get there.
Q. And did he give you directions?
A. Yes.
Q. Now, while you were talking with Diaz, do you observe anything about what Joel Perez was doing?
A. At that point Joel asked me to ask him that was fish scale.
Q. What did you do?
A. I asked Alex, hey, he want to know if it's fish scale. He told me yes.

Q. Just to be clear, you asked Diaz if it was fish scale?
A. Excuse me?
Q. Just to be clear, you say that you asked Alex Diaz whether it was fish scale?
A. Yes, sir.
Q. And how did Alex Diaz respond?
A. "Yes."
Q. What did you do then?
A. I turned to the side and told him yeah, it's fish scale.
Q. Now, did you observe anything else about what Joel Perez was doing while you were talking with Alex Diaz?
A. I see that he take out his phone when I was talking to Alex Diaz on the phone.
Q. And did you see what he did with his phone?
A. He put it in here, but I was driving and listen to what Alex Diaz was telling me.
Q. Could you tell whether or not Joel Perez was using the phone?
A. I only know he reached for his phone and put it in the ear, but besides that --
Q. While you were en route to Arlington Heights with Joel Perez, did you have any discussions about the plan?
A. Really we talk about that as the only thing Perez was concerned to be as good as Alex Diaz was telling me.
Q. And did you have any discussions about money?

A. I was already on the phone, yeah, I have the conversation with Alex Diaz.
Q. I'm sorry. While you were en route to Arlington Heights with Joel Perez, did you have any discussions with Joel Perez about money?
A. No.
Q. Just to be clear, did you have any discussions with him before you started heading to Arlington Heights?
A. Yes.
Q. And what was that discussion again?
A. Well, the discussion about the money was don't bring the money.
Q. And what did Joel Perez say in response to that?
A. He said okay.
Q. Did you at some point reach Arlington Heights?
A. Yes, sir.
Q. What did you do when you got there?
A. When I get to the exit Arlington Heights, I call Alex Diaz.
Q. And what did you tell him?
A. I say look, I'm here already.
Q. What did he say?
A. He told me take to the left.
Q. And just to be clear, where are you at this point?
A. I'm before to hit the light at the other side of the car

line to the right.
Q. Are you basically just getting off I-90 on an exit ramp?
A. Yes.
Q. And just to be clear, is that going left would be going south and going right would be going north?
A. Yes.
Q. So what did Alex Diaz tell you to do?
A. He told me take to the left. I said look, if I turn to the left, I'm going back to Chicago.
Q. What did he say?
A. He said look to the side, turn to the right. You are going to see two gas stations there.
Q. And what did you do?
A. I said which one? I stay on the phone with him and he told me the Shell.
Q. The Shell?
A. The Shell.
Q. What did you do then?
A. I keep driving with him on the phone. I stopped by the light waiting for the arrow and I see passed Alex Diaz in a red Volkswagen.
Q. So what did you do at that point?
A. I hang up the phone. I wait for the arrow, change the light, and I turned.
Q. And then what did you do?

A. I went to the Shell gas station.

MR. LEE: May I approach, your Honor?

THE COURT: Yes.

BY MR. LEE:

Q. Mr. Cruz, I'm showing you what has been previously marked as Government Exhibit Shell Photo 2.

Do you recognize this?

A. Yes.

Q. What is it?

A. Of the Shell gas station that I went.

Q. Does this photo truly and accurately depict the Shell gas station as you remember it from August 5th, 2008?

A. Yeah, the same, but the green car was not there.

Q. But other than that, does this truly and accurately depict the Shell gas station?

A. Yes, sir.

MR. LEE: Your Honor, the government would move for the admission of Government Exhibit Shell Photo 2.

THE COURT: It is received and may be published.

MR. LEE: Thank you, your Honor.

(Government Exhibit Shell Photo 2 received in evidence.)

BY MR. LEE:

Q. All right. Mr. Cruz, I'm showing you what has been previously -- what has been admitted as Government Exhibit Shell Photo 2. Can you just situate the jury from here.

Where were you looking from?

A. Excuse me?

Q. What direction are we looking from at this photo?

A. On the gas station parking.

Q. And is this the view as you come into the Shell gas station?

A. Yes.

Q. And you mentioned a green car.

Is that the car that's over on the side of the photo?

A. Yes, the one right there by the pole.

Q. I'm now showing you --

MR. LEE: If I may, your Honor?

BY MR. LEE:

Q. -- what's been previously admitted as Government Exhibit Shell Photo 1.

THE COURT: Yes.

BY MR. LEE:

Q. All right. Mr. Cruz, can you describe what this is?

A. This is the side of the parking of the Shell gas station.

Q. And does this substantially represent how it looked when you were there on August 5th, 2008?

A. Mostly. Only the bushes are a little bit more higher.

Q. Is it that the bushes are higher in the photo than they were when you went there --

A. Yes.

Q. -- or the other way around?
A. Yes, the bushes are a little higher now.
Q. Now, you mentioned that you parked at the gas station. Where did you park?
A. Right there where's the green car right now.
Q. And which way did you park?
A. When I get inside the gas station, I put my truck in reverse and the back bumper was facing to the bushes.
Q. And then what did you do?
A. I got out from the truck, I waiting for Alex Diaz.
Q. About how long were you waiting for Alex Diaz?
A. Three to five minutes.
Q. And what happened then?
A. I see he pass in front of me.
Q. And how did he arrive?
A. He arrived in a red Volkswagen.
Q. So what did you do then?
A. I assume he parking his car, I get out of my truck.
Q. And just to be clear, where did he park?
A. He parked near to the gas station on the corner of the building right there by the gas station.
Q. So would it be the space about two or three spaces away from --
A. Yeah, by the handicapped space.
Q. And again, so what did you do at this point?

A. Get out of the truck, Joel Perez get out of the truck too. We walk --

Q. What did you and Joel Perez do?

A. We walked toward the red Volkswagen.

Q. Where did you go specifically when you went over to Mr. Diaz's car?

A. I approached to the passenger side of the window of the red Volkswagen.

Q. And which way was he parked?

A. He parked facing the front, the nose of the Volkswagen to the bushes.

Q. So you went to the passenger side.

Where did Mr. Perez go?

A. He went to the back of the Volkswagen by the bumper.

Q. So about how far away was he from you?

A. Two and a half or three feet.

Q. And where was Mr. Diaz at this point?

A. He sit down in the driver seat.

Q. What did you do then?

A. Shift to the window and said, what's up.

Q. And was the window up or down at that point?

A. Down.

Q. So this is the passenger side window?

A. Yes, sir.

Q. Now at this point, did Joel Perez do anything?

A. When I say hi to Alex Diaz, Joel Perez asked me, ask him it was fish scale.
Q. Just to be clear, was that Joel Perez asked you to ask Alex Diaz if it is fish scale?
A. Yes, sir.
Q. What did you do?
A. I turned my face and I asked Alex Diaz, hey, is it fish scale? He said yes.
Q. Then what did you do?
A. I turned my face to Joel Perez, say yeah, he says it's fish scale.
Q. What did Joel Perez do then?
A. Then Joel Perez approached to me and said hi to Alex Diaz.
Q. What happened next?
A. After that, Alex Diaz told me, you got too much time. They're ready. It's like two blocks from here. Going to be fast. Follow me.
Q. So at this point, what was the plan?
A. The plan was to follow Alex Diaz to the place nearby that he say was a parking lot with apartments.
Q. And then what was going to happen?
A. Excuse me?
Q. And then what would happen when you got there?
A. Well, we get there was to check the kilo of cocaine.

Q. And then in your mind what was the plan after you checked the quality of the cocaine?
A. It is the way he was saying, it was fish scale, pure cocaine, good, we gonna go back, get the money, and come back and purchase the kilo of cocaine.
MR. LEE: If I may, your Honor?
THE COURT: Yes.
BY MR. LEE:
Q. Mr. Cruz, I'm showing you what has been previously marked as Government Exhibit Recording of August 5th, 2008, Meeting and Government Exhibit Transcript of August 5th, 2008, Meeting.
Take a look at these and describe the recording exhibit first.
A. Yeah. This is the CD containing the conversation I have with Alex Diaz.
Q. Is this the conversation you were just talking about with Alex Diaz and Joel Perez?
A. Yes, sir.
Q. How do you recognize that?
A. By the voices.
Q. Did you listen to the CD before coming here?
A. Yes.
Q. And did you date it in some way?
A. With my initials.
Q. Your initials on the CD?

A. Yes, sir.
Q. What about Government Exhibit Transcript of August 5th, 2008, Meeting?
A. Yeah. This is transcript contained translated from the CD.
Q. And did you review that prior to coming here?
A. Yes, sir.
Q. And did you date it in any way?
A. Yeah, put my initials.

MR. LEE: Your Honor, the government would move for the admission of these two exhibits. These were also part of the stipulation I read earlier.

THE COURT: They are encompassed by the earlier stipulation?

MR. LEE: Yes, your Honor.

THE COURT: All right. They are received.

(Government Exhibits Recording of August 5th, 2008, Meeting and Government Exhibit Transcript of August 5th, 2008, Meeting received in evidence.)

MR. LEE: May I publish to the jury?

THE COURT: Yes.

MR. LEE: I'll just publish the transcript exhibit, not the recording.

THE COURT: Yes.

Now that recording, like the others, is in the

Spanish language?

MR. LEE: Yes, your Honor, I think there are a few spare words in English, but predominantly in Spanish.

THE COURT: All right. Proceed.

MR. LEE: Your Honor, the government would like to publish this transcript as we did the prior transcript.

THE COURT: Same technique. Yes, you may proceed.

MR. LEE: Yes. At this point I will read the notations as well as note the part spoken by Joel Perez.

THE COURT: Proceed.

MR. LEE: Hey.

THE WITNESS: Do I follow the light on the right or the left.

MR. LEE: Follow me. I'm up here ahead.

THE WITNESS: Does that have scale/flake?

MR. LEE: What.

THE WITNESS: Does it have a scale/flake?

MR. LEE: Yeah, all of it.

THE WITNESS: Look, it has the scale/flake.

MR. LEE: And the transcript reflects Perez says what, and then there is some static on the recording.

Hey, what's up.

The transcript has statis and says: Hey, what's up?

Two blocks on the left-hand side and then by the little apartments there, okay?

THE WITNESS: Is this DuPage County here?

MR. LEE: And the transcript reflects there is some inaudible conversation and the voices overlap.

The transcript also reflects that Perez then said, Is this the same old man that you went with over there?

It's El Tio.

THE WITNESS: Huh?

MR. LEE: The transcript reflects Perez now says, El Tio.

El Tio, the original.

THE WITNESS: Hey, we are going to go around, I don't like this to be there.

MR. LEE: That will be fast, it won't take long at all. Five minutes, then we're out.

THE WITNESS: It's a bitch.

MR. LEE: Transcript reflects a conversation in the background which is unintelligible.

THE WITNESS: All right. This bitch phone is mine now too, and now we are all on probation, brother. We are scared as hell that --

MR. LEE: But we have been waiting here for a long time, man.

THE WITNESS: Huh.

MR. LEE: We have been waiting here a long time. Get in.

MR. LEE: And that's the end of the transcript.

BY MR. LEE:

Q. Mr. Cruz, just to be clear, at this point when you finished your conversation with Alex Diaz and Joel Perez, what was your plan for what was going to happen next?

THE WITNESS: We are supposed to follow Alex Diaz.

Q. And who was going to follow Alex Diaz?

THE WITNESS: Me and Perez.

Q. And what were you -- where were you going to follow him to?

THE WITNESS: We are going to follow him to a nearby parking lot with apartments.

Q. And what was the plan that was going to happen when you got there?

THE WITNESS: Well, we gonna check the kilo of cocaine, if it was as good as he was saying.

Q. And if the quality of cocaine was as good as Alex Diaz was saying, what was your plan for what would happen then?

THE WITNESS: Go back and get the money.

Q. And who would go back and get the money?

THE WITNESS: Me and Perez.

Q. And then what would you do when you and Perez got the money?

THE WITNESS: Come back and purchase the kilo of cocaine.

Q. And then what would happen after that?
A. Well, we take the kilo of cocaine with us.
Q. So after this meeting ended between you, Alex Diaz, and Joel Perez, what did Alex Diaz do?
A. He backed his car in reverse and start going to the intersection to go so I can follow him.
Q. So Alex Diaz, he left the area?
A. Yeah.
Q. And that was by car?
A. Excuse me?
Q. And that was by car?
A. Yes.
Q. What did you do?
A. I was going to turn to my car. I told Perez, let's go. He said no, I got somebody else to pick me up.
Q. So at this point, where was Perez?
A. He was walking to the other side of the gas station.
Q. And let me show again Shell Photo 1.

Can you describe for the jury where did Perez go at this point after the meeting with you, Alex Diaz, and Perez had ended?
A. When I was going to the truck, Perez was walking between the bushes right there where is the white pole.
Q. He is walking out of the gas station parking lot?
A. Yes, sir.

Q. What did you do then?
A. I get in the truck.
Q. Before you got to the truck, did you say anything to Joel Perez as he was walking through the bushes?
A. Follow me.
Q. What did you mean by that?
A. To follow me because we supposed to go see the kilo of cocaine.
Q. So what happened when you got into your car?
A. I turned my car. I tried to reach Alex Diaz, but it was like eight, ten cars get in front of me. I cannot reach him.
Q. When you say "reach him," do you mean catch up to him?
A. Yes.
Q. So then what happened?
A. Then Perez called me on my phone.
Q. And did you take the call?
A. Yes.
Q. And what did Perez say?
A. "Come back."
Q. And did you say?
A. "Okay."
Q. What did you do then?
A. I put in reverse the SUV and I start getting reverse to the gas station.
Q. And then what did you do?

A. I parked the SUV in the same spot that I have before.
Q. And which way were you facing?
A. My bumper facing to the bushes.
Q. And then what did you do?
A. I get out of the truck, start walking through the bushes to the other parking lot.
Q. So were you going the same way that you had seen Perez go?
A. Yes.
Q. And as you were coming through the bushes, what did you see?
A. I see Perez and a black car with another person in the car.
Q. And where was this black car?
A. Parked right there between the gas station and the other parking lot.
Q. So about how far away was this black car from the area where you had been with Alex Diaz?
A. Excuse me?
Q. About how far away was this black car from where you had been with Alex Diaz?
A. In the handicapped parking lot?
Q. Yes.
A. It's far.
Q. Excuse me?

A. It looks far, it's more than 50 feet.
Q. How many feet?
A. More than 50 feet.
Q. Now, as you saw the car, was it -- as you crossed the median, was there any space between -- were there any parking spaces between where you crossed to the bushes and where you saw the car located?
A. When I crossed the bushes, it was parking there, but it was empty.
Q. Mr. Cruz, I'm showing you what has been previously admitted as Government Exhibit Arlington Heights Photo.
Do you recognize this?
A. This look like the gas station and the parking lot next to the gas station.
Q. And is this an aerial view of the gas station.
A. Excuse me?
Q. Is it an aerial view, an overhead view of the gas station?
A. Yes.
Q. Now --
MR. LEE: May I hand the witness a laser pointer, your Honor?
THE COURT: Yes.
BY MR. LEE:
Q. Mr. Cruz, this red button will activate a laser pointer.

If you could just point out for the jury about where your car was parked.

A. My car?

Q. Yes.

A. At the corner right there (indicating).

Q. And you were also describing how Alex Diaz was always parked near your car.

Where was that car parked?

A. Right here (indicating).

Q. And that's the parking space closest to the -- it looks like to be a building?

A. Yes.

Q. Now, you mentioned that you crossed through the median to the next lot, that you saw the black car.

Where was the black car located, can you identify that?

A. It was parking around there (indicating).

Q. Okay. Thank you.

And so that's about a parking spot immediately into the next lot. Parking spot immediately in the next lot?

A. Yes.

Q. Now, you mentioned earlier that the black car was about 15 feet away.

What do you mean when you say that?

A. You asked me how far was the car parking for Alex Diaz.

Q. How far was it from where you crossed the median?
A. Through the bushes.
Q. So was it a long distance -- when you crossed the bushes, how far away was it from you at that point?
A. I can't exactly, but it's six feet or seven feet.
Q. Now, when you saw the car, did you observe anything about the car?
A. I see Joel Perez there.
Q. And where was he?
A. He was in the passenger seat.
Q. And was there -- did you see if there was anyone else inside the car?
A. Yeah, there was another person in the car.
Q. And where was that person?
A. In the driver's seat.
Q. Now, where did you go in particular at this point?
A. I went straight to the passenger side.
Q. And when you got to the car, did you observe anything about the driver?
A. He was looking around with his hand on the steering wheel.
Q. And when you got to the car, what happened?
A. Excuse me?
Q. What happened you got to the passenger side?
A. Joel Perez apologized to me.

Q. Now, where were you exactly at this point?
A. In front of the passenger side, standing up outside.
Q. So you are outside the car?
A. Yes.
Q. Was the passenger side window up or down?
A. Down.
Q. You said that Joel Perez apologized. What do you mean by that?
A. Because when I approached to him, he told me, I apologize, I don't tell you that I called somebody else to come down here.
Q. Just to be clear, can you just say what were Joel Perez's words at this point?
A. He told me -- he was giving me apologize because he don't told me that he called somebody else to pick him up.
Q. Okay. There's a lot of "he's" in that sentence.
Do you remember what his words were?
A. He told me exactly, he said, I'm sorry that I don't told you that I called somebody to come pick me up.
Q. Then what did you do?
A. He introduced me to the guy that was in the driver's seat.
Q. Now, what did you understand Joel Perez to be saying that -- those words to you?
A. Because me and him have a conversation about don't bring

no money, don't bring nobody else.

Q. Now, did you observe anything about the driver at that point? What was he doing?

A. After Joel Perez apologized, he introduced me to him.

Q. What did you do?

A. I say hi and give him a handshake.

Q. As Joel Perez was talking to you, did you observe anything about whether the defendant -- excuse me, about whether the driver was paying attention to what your conversation was with Joel Perez?

A. Yes.

Q. What did you observe?

A. Because me and Perez be talking, he is there.

Q. Was the car running at this time?

A. Yes.

Q. Was there any kind of music?

A. Yeah, the music was on, it was low.

Q. It was low in volume?

A. Yes.

Q. And again, what happened after Joel Perez apologized?

A. I received a phone call from Alex Diaz.

Q. Before we get to that, you mentioned that you had shaken the driver's hand?

A. Yeah, he present me the driver, say, look, this is Alex.

Q. Looking around the courtroom, do you see the driver who

was identified to you as Alex?
A. Yes.
Q. Can you identify him?
A. Him right there (indicating).
Q. Can you see anything about what he is wearing?
A. A tuxedo with a blue shirt.
MR. LEE: Your Honor, may the record reflect that the witness has identified the defendant?
THE COURT: Yes. So ordered.
BY MR. LEE:
Q. So after you were introduced to the defendant, what happened then?
A. I receive a phone call from Alex Diaz.
Q. And did you take this call?
A. Yes.
Q. And what did Alex Diaz say?
A. He said where I am.
Q. What did you say?
A. I say man, you take off. It was like eight or ten cars in front of me. I cannot get to you.
Q. Now, as you were talking with Alex Diaz, could you observe what Joel Perez was doing?
A. He was listening to me, to the conversation I have with Alex Diaz.
Q. Did Perez say anything?

A. Yeah, he told him that we don't want to go there.
Q. Were those his words?
A. Yes.
Q. Tell him we don't want to go there?
A. Yes.
Q. So at this point you are standing outside the car, there's this one conversation on the phone with Alex Diaz, and you are also hearing from Joel Perez who is inside the car?
A. Yes.
Q. So then what did you do?
A. I told -- I told Alex Diaz what Perez was telling me.
Q. And what was that?
A. It's late, they don't want to go there.
Q. And then what happened?
A. Then Perez told me, hey, tell him we got the money here.
Q. Are those his words?
A. Yes.
Q. What was the driver, the defendant, what was he doing at this time?
A. After Perez told me the last sentence word, he repeat the same thing, both at the same time.
Q. And what was that sentence?
A. "Tell him we got the money here."
Q. So what did you do then?
A. I told Alex Diaz they got the money here.

Q. How did Alex Diaz respond?
A. He told -- he said that's okay. Bring the tools here to the gas station.
Q. What when he said "tools," what did you understand that to mean?
A. The kilo of cocaine.
Q. So what was the end result of this telephone call with Alex Diaz?
A. After I told him to bring the tools to the gas station, I say okay, I will be there. I finish the phone call, and I told Perez that he would be here.
Q. And just to be clear, I think you said, I will be there. Who was saying I will be there?
A. By phone?
Q. Yes.
A. Alex Diaz.
Q. He was saying I will be there?
A. Yes.
Q. Now after your call with Alex Diaz, what did you do?
A. I told Perez he told me that he come this way.
Q. What did you tell Perez?
A. I told Perez that he said that he is going to come this way, Alex Diaz.
Q. How did Joel Perez respond?
A. "Okay."

Q. After this discussion with Joel Perez, do you have a discussion with the driver, the defendant?
A. The driver start talking about I'm down here because he call me to be here, he's not -- he getting mad at me.
Q. And did you have a understanding as to -- well, first of all, were those his words?
A. Yes.
Q. And what was your understanding of what he was saying?
A. Because he already is in the parking lot there waiting for Joel Perez, he already had to know what is going on.
Q. When you said -- I think you said that the driver said something like, I don't -- he made me come here. Who did he -- who was the defendant referring to when he was --
A. Perez.
Q. -- he was saying "he"?
A. Perez.
Q. Now, did you relate that statement to any of your prior conversations with Joel Perez?
A. Yes.
Q. And how did you do that?
A. Because I told Perez don't bring to money, don't bring nobody else.
Q. And so what do you understand the defendant was saying when he said those words?
A. That he don't do what Perez was telling him, he was

getting mad at him.
Q. And, again, there is lot of "he's" there. Is that the he -- if the defendant had not done what Perez had wanted, Perez would have been mad at the defendant?
A. Yes, sir.
Q. What happened next?
A. Then I tried to stretch myself, and I am trying to get to the window again to start talking to them, and Perez and Vasquez see people coming from the gas station.
Q. All right. About how long -- about how much time had gone by between your call with Alex Diaz and what you are just saying about the defendant and Perez observing something?
A. Three or five minutes.
Q. And at this point, where were you?
A. I'm standing outside of the black car next to the passenger side.
Q. And which way were you facing?
A. I'm facing toward the car.
Q. So you are looking into the car?
A. Yes.
Q. And where were the defendants at this point?
A. Alex Vasquez was sit down in the driver seat and Perez was in the passenger side.
Q. And which passenger, was it the front or the back?
A. The front.

Q. And which way were they facing?
A. They looking toward the gas station.
Q. So you said that they saw something.
How did you observe them -- how did you observe that they saw something?
A. Because he put the car in reverse and said tedige.
Q. I can back up.
How did Mr. Cruz -- you said that you saw that they saw something. How did you tell -- how did you know that they saw something?
A. Because I'm looking to them.
Q. What did you see about them?
A. The expression.
Q. And what was their expression?
A. When he put the car in reverse, the expression on his mouth said tedige.
Q. You said "he." Who are you referring to at this point?
A. Vasquez.
Q. Vasquez.
Where was he in the car?
A. Driving.
Q. You mentioned a term "tedige."
First of all, can you spell that term?
A. "Tedige"?
Q. Yes.

A. You want to know what it mean?
Q. First spell it and then say what it means.
A. T-E-D-I-G-E.
Q. And is this a term in English or Spanish?
A. It's in Spanish.
Q. And what does that term mean to you?
A. "I told you."
Q. And, again, who said I told you?
A. Vasquez.
Q. And then what happened?
A. Then the commotion of the car back and forth, I stepped to the side, police coming to me with a gun in their hands, and raise your hands.

THE COURT: This might be a good stopping point.

Members of the jury, we will take a short recess and then we'll continue on with this direct examination.

The jury may leave the room.

(Jury out.)

THE COURT: The jury has left the room.

We will take about a ten-minute break.

The defendant may leave the room for about ten minutes.

MR. BRINDLEY: Thank you, your Honor.

MR. LEE: Just for planning purposes, your Honor, I don't have that much more to do.

THE COURT: I expect there will be some cross examination.

MR. LEE: I expect so too.

(Recess.)

THE COURT: Proceed.

MR. LEE: Thank you, your Honor.

BY MR. LEE:

Q. Mr. Cruz, we were talking a little bit about basically the arrest, right before the break.

Just back up a moment. Can you point, using the laser pointer that we used earlier, can you point out for the jury on the screen about where you were when you first observed things happening?

A. The car was around there, and I was in the passenger of the black car.

MR. BRINDLEY: Your Honor, I would object to foundation, just so we know what things are happening. I'm not sure which things.

THE COURT: Later a better foundation.

MR. LEE: Yes, your Honor.

BY MR. LEE:

Q. Mr. Cruz, can you point for the jury on the screen where you were when you first observed the defendant and Perez observed something, observed the agents coming towards them. And you are pointing to a parking space near the east side of

the lot, next to the gas station, is that correct?
A. Yes, sir.
Q. Now, what happened after you noticed that the defendant and Perez reacted to the agents coming towards them?
A. The car was going in reverse back, there was another car here and another car there. I was to the side.
Q. All right. You were saying the car was here, the car was there.
Could you begin -- would it help if you used the laser pointer to indicate what you are talking about?
A. Well, the car, the black car was right there. Then by the time I noticed that the agent was coming, it was the car around here and another car came to the side to try to get into the other corner.
Q. And what kind of cars were these?
A. It was regular cars.
Q. Were the cars -- was there anything unusual about these cars?
A. Regular cars.
Q. Were these police cars?
A. At that moment that I was looking around to the facing the police, I just see a car behind, and then SUV to the other side.
Q. Did you observe whether these cars had any kind of lights?

A. I don't remember.
Q. Did you hear anything at this point?
A. I was facing -- turn, the police was coming with the gun.
Q. Could you hear anything?
A. Only the police was telling at me raise your hands. Raise your --
Q. And so they were saying raise your hands?
A. Yeah.
Q. Did you hear any kind of sirens?
A. At that point, no.
Q. Now, where were the -- you said there were some police coming to you. Were those police on foot or on cars?
A. The ones coming up to me was on foot.
Q. And where were they coming from?
A. From the gas station.
Q. And so can you point -- using the laser pointer can you show where they are coming from?
A. They were coming from here, and to the side.
Q. So the ones coming from the gas station, were those coming through the same pathway that you had gone through?
A. Yes.
Q. Did you observe anything about what these agents on foot were wearing?
A. The one coming to me have a jacket with a card next to his neck, card in his vest, and gun in his hand.

Q. What was around his neck?
A. A card with a strap around his neck.
Q. And anything around --
A. A jacket.
Q. Anything distinctive?
A. Got words.
Q. What words were on his jacket?
A. "Police."
Q. Mr. Cruz, I'm showing you what was previously admitted as Government Exhibit Patch Photo. Looking at this, do you recognize this exhibit?
A. Yes.
Q. What is it?
A. That was the letters was on the jacket.
Q. So this was the patch, this was what was on the jacket you were describing?
A. Yes.
Q. At this point could you observe anything about what the defendant was doing?
A. The moment the police approached to me, I just -- the car was back and forth trying to get out of the parking lot.
Q. When you say "the car," do you mean the defendant's car?
A. Yeah.
Q. So what was it doing?
A. It was going back and forth.

Q. And then what did it do?
A. To the point that he got out of the parking lot.
Q. And which way did he go out of the parking lot?
A. To the other side of the car, the street.
Q. Use the laser pointer again. Can you show basically how it moved?
A. He was back and forth here, through. He go that way.
Q. And did you see which direction he went?
A. (Indicating.)
Q. Just to be clear, so he is leaving the parking lot to the north side of the photo?
A. I just see when he was getting from there, because at that time they put me on the floor.
Q. Did you see which direction the defendant's car went in?
A. Just only this way.
Q. And so at this point what were you doing?
A. They got me on the floor.
Q. Stepping back a little bit, when you saw the agents approaching you and they were yelling police, what did you do?
A. They told me hands up.
Q. What did you do?
A. I put hands up. My hand.
Q. And then what happened?
A. And they told me, get on the floor.
Q. What did you do?

A. I get on the floor.
Q. Did you have any difficulty identifying the agents that were coming towards you?
A. Excuse me?
Q. Did you have any difficulty identifying that these were agents who were approaching you?
A. By the time the one was coming with a gun, I realized it was police.
Q. Now, Mr. Cruz, just to be clear, about how much time passed between your telephone call with Alex Diaz when you were at the black car and the agents coming to arrest you?
A. Three to five minutes.
MR. LEE: May I have a moment, your Honor?
THE COURT: Yes.
MR. LEE: Nothing further at this time, your Honor.
THE COURT: You may cross examine.
MR. BRINDLEY: Thank you.

CROSS EXAMINATION

BY MR. BRINDLEY:
Q. Mr. Cruz, let's begin by talking about the arrest you were just discussing.
You said that you were standing over near the passenger door of the black car when the police started coming, right?
A. Yes.

Q. And when they started coming, at the time that they approached you, you said you didn't hear any sirens, right?
A. At the moment, no.
Q. Okay. And you said that you didn't see any lights, right?
A. Yes. I was looking to the guys.
Q. And you didn't see lights, correct?
A. Yes.
Q. You said, in fact, you said that the cars that you saw were regular cars, right?
A. Yes.
Q. And you said what you heard was you heard somebody say hands up. That's what you heard, right?
A. No. Just when the guys -- when the police was coming and the police was coming to me, then he told me hands up.
Q. Okay. So what you -- what the police were coming to you said was hands up, right?
A. Yeah.
Q. You didn't hear the police say anything else then?
A. At that particular moment, no.
Q. You talked about seeing the jacket with the "Police" written on it. Where was "Police" written on this jacket?
A. Excuse me. Repeat the question.
Q. Yeah. You said there was -- you saw somebody wearing a jacket that said "Police" like patch that he showed you,

remember?
A. Yes.
Q. Okay. And when you saw that, where was that patch located?
A. On the side of the jacket.
Q. So the side of the jacket, like the arm?
A. No. The front.
Q. On the front?
A. Yeah. The side.
Q. Over here?
A. Yes.
Q. Okay. And you saw the man coming, you saw he had his gun drawn as he approached you, right?
A. Yes.
Q. Did you see if the other officers had their guns drawn as well, or just the one?
A. I was just paying attention to the guys that told me hands up.
Q. Then you got down?
A. After he approached to me, he said police and get down on the floor, yeah.
Q. You said when you got down on the ground, was that before or after Mr. Vasquez started to move the vehicle?
A. No. I was standing right there next to everything was happening at that moment.

Q. So you were still standing when the thing started to move, the Bonneville started to move back, correct?
A. Yes.
Q. And you said that you saw the car move back and forth, right?
A. Yes.
Q. So it backed up and it would go forward again and back up and go forward again?
A. Yes.
Q. That's what you saw?
Did you see a collision with the other vehicle?
A. The other car was a little bit behind the black Bonneville and -- the other car was in this side.
Q. Okay. And you saw a collision, you saw those cars collide with the Bonneville?
A. Well, the Bonneville was in reverse. That's when I see it hit that.
Q. The Bonneville was in reverse and when you saw --
A. The car was standing there when the Bonneville went and it hit it.
Q. The Bonneville went back and that's when the collision happened?
A. Yes.
Q. Now, on August the 5th of 2008 -- Mr. Cruz, let me ask you one other question first.

You said the Bonneville went backwards and then it hit the cars and then it pulled forward again. Is that what happened?

A. He was trying to get back and forth to get out of the parking lot.

Q. So it backed up then went forward again?

A. Um-hum.

Q. And that happened more than once?

A. Yeah. Twice, I think.

Q. And so you didn't see the Bonneville back up in between the two cars, did you?

A. Yeah. As he was in the reverse. He bumped with the other car, then went to the front. The other car went to the front. He tried to get out from the spot.

Q. So he backed up and the back of his car hit one of the cars, right?

A. Yes.

Q. Okay. And then he moved forward again, right?

A. Yes.

Q. And then one of the other cars moved?

A. Yes. Moving from the back of the Bonneville.

Q. They moved in the back and then he backed up and hit the other car, the back of his car?

A. What other car? The same car?

Q. There is only one car.

A. The one to the behind and one to the other side.
Q. He hit one car or hit two?
A. I only see when he hit one car.
Q. You only saw when he hit one car?
A. No. I say when he saw -- when he hit the car, it was behind the Bonneville.
Q. So you saw him back up and saw the rear part of his car strike the vehicle behind him, right?
A. Yeah.
Q. All right. And then he pulled forward, right?
A. Yes.
Q. Okay. And then he backed up again and you saw the other car move behind it?
A. Yeah. It was moving. The two -- both of the cars was moving.
Q. So both of the two cars behind Mr. Vasquez car were moving at the same time, right?
A. The car behind was moving as Vasquez was trying to get reverse and back and forth.
Q. So the car behind -- parked behind it was moving as he put it in reverse. That's what you were saying?
A. He hit it. He turned the back -- Bonneville hit the back bumper of that, trying to get back, coming back. That's the way he was trying to get out.
Q. Okay. My question to you, sir, so we get clear on this,

is whether the cars that were behind him, were those cars moving when he was moving back or were they parked?

A. The car was right there waiting when he went back to the Bonneville, hit the other car.

Q. Okay. And you never saw it hit the other car?

A. No.

Q. On August the 5th of 2008, or before August the 5th, your involvement in this transaction with Alejandro Diaz, that ultimately ended with your arrest, that began back around August 4th, correct?

A. Yes.

Q. And what happened was you had this conversation with this man Alejandro Diaz on the phone, right?

A. Yes.

Q. And you were contacting Diaz to try to get cocaine, right?

A. Yes.

Q. And Diaz informed you that he had cocaine, right?

A. Yes.

Q. And when you found out that he had cocaine, you made a call to someone you thought might buy it, right?

A. I made the phone call because they already told me Perez to find something.

Q. So Perez already told you that he wanted cocaine, right?

A. Yes, sir.

Q. So when you found out Diaz had it, you called Perez, right?
A. Yes, sir.
Q. And just to be clear, you didn't call Alexander Vasquez ever, did you?
A. Ever.
Q. Before you got arrested you didn't even know who Alexander Vasquez was, did you?
A. Excuse me?
Q. Before you got -- let me rephrase the question.
Before you got arrested, you had never met Alexander Vasquez at all, had you?
MR. LEE: Objection, your Honor.
THE COURT: Overruled.
You may answer.
BY THE WITNESS:
A. Where? In Chicago? In the parking lot?
BY MR. BRINDLEY:
Q. Before. Yeah. Before you went to the parking lot in Arlington Heights, you had never met Alexander Vasquez, right?
A. Yes.
Q. Yes, you have? Yes, you haven't?
A. No, I haven't met.
Q. And before you went to the parking lot in Arlington Heights, you had never spoken to him, right?

A. Right.
Q. When you called Joel Perez to tell him about the potential source of cocaine in Mr. Diaz, Perez told you that he was -- Perez was interested in buying it, right?
A. Yes.
Q. He didn't tell you about anybody else being interested in buying it, did he?
A. That's correct.
Q. Okay. He didn't say anything to you on the phone about sharing the cocaine he was buying with anybody, did he?
A. That's correct.
Q. And he didn't say anything to you about anybody else having anything to do with providing the money, did he?
A. Excuse me. Repeat the question.
Q. Yes.

Mr. Perez, when he had talked to you on the phone, he didn't say anything to you about anybody else besides him providing the money, did he?
A. In the point in the question be to me: Don't bring the money. I don't know where he want to get the money or not.
Q. Okay. So the deal you had with Perez was not to bring any money, right?
A. Yes.
Q. There wasn't supposed to be any money there at all, was there?

A. That's correct.
Q. So Perez certainly never told you that anybody else was going to be involved in bringing any money, did he?
A. At that point?
Q. On the phone.
A. Perez and me was. When I bring with Perez, it was to go there, see the cocaine. And it was good, we going back and get the money.
Q. So when you were on the phone with Perez, you didn't have any plan to have anybody else bringing money anywhere, did you?
A. It was only me and him.
Q. It was only you and him, right?
A. Um-hum.
Q. After you spoke to Diaz -- after you talked to Perez, you ended up calling Diaz back, right?
A. Yes.
Q. And you talked to Alejandro Diaz on the 5th of August about setting up a deal between Diaz and Perez, right?
A. Yes.
Q. And then after you talked to Diaz, you contacted Perez, right?
A. Yes.
Q. And when you talked to Perez, you informed him that you guys were going to have to go meet Diaz, right?
A. Um-hum.

Q. Is that a "yes"?
A. Yes.
Q. Okay. And what you told him was that you said that Perez seemed mad, right?
A. Excuse me?
Q. When you told him that he was going to have to go meet Diaz, you said Perez was mad about it, right?
A. About the meeting?
Q. Yes.
A. Yes.
Q. He said he was shopping with his family, and he didn't want to do the deal, right?
A. Yes.
Q. And then eventually it was Perez who called you back, correct?
A. That's correct.
Q. And Perez said then that he did want to do the deal, correct?
A. Yes, sir.
Q. And when he called back again, Perez didn't tell you anything else about being involved in this deal, did he?
A. No. It was according to the plan we had, me and him.
Q. It was still you and him, right?
A. Yes.
Q. And then you called Diaz back and you set up the time and

place where this was going to happen, right?
A. Yes.
Q. And Diaz directed you to go to Arlington Heights at this gas station, right?
A. Yes.
Q. Okay. Now, one of the things that was discussed on direct examination was these two transcripts of calls that you had with Alejandro Diaz.
Do you remember those transcripts?
A. Excuse me?
Q. Do you remember going over the transcripts on direct examination, right?
A. We read them.
Q. Yeah.
A. Yes.
Q. Okay.
MR. BRINDLEY: May I approach the witness with the transcript, your Honor?
THE COURT: Yes.
BY MR. BRINDLEY:
Q. Just, Mr. Cruz, showing you the transcript from August 4th, 2008, at 4:25, this is one of the transcripts you just read, correct?
A. Yes.
Q. All right. I'm going to direct your attention to a

couple of spots in here and ask you what you meant. This is a call between you and Alejandro Diaz, right?

A. Um-hum.

Q. Okay. I'm going to direct your attention now to here, line 21, where you were speaking to Diaz and he said no, I'm -- I'm south. Let me call for mine, to give him the number that I'm going to give him. And -- and if he says yes, we'll see -- I'll see you later on tonight.

You said that, right?

A. Yeah.

Q. And when you said "he," you referred to Perez, correct?

A. Correct.

Q. And during that entire call, the only customer ever referred to was Perez, correct?

A. Correct.

Q. And then you followed Mr. Diaz's instructions and you went out to Arlington Heights, this gas station, correct?

A. Correct.

Q. The Shell station it was, right?

A. Yes, sir.

Q. Now, during the ride over there you said you saw Perez pick up his phone, but you didn't hear what he said, right?

A. That's correct.

Q. Now, after you talked to Diaz, it was actually you who had to go pick up Perez in your car, correct? Isn't that

correct?
A. That's correct.
Q. And you picked up Perez outside a Baskin-Robbins, is that correct?
A. Yes, sir.
Q. And when you picked up Perez outside the Baskin-Robbins, Perez was alone, wasn't he?
A. That's correct.
Q. And when you asked Perez if there was -- he had any money -- he told you he didn't have any money, correct?
A. Correct.
Q. And you discussed with him the plan to check the quality and then, if it was good, to buy it later, correct?
A. Yes.
Q. And he agreed with that, didn't he?
A. Yes. Yes.
Q. He made no mention of anybody else bringing any money when he was in the car with you, did he?
A. Yes.
Q. You are agreeing with me, right?
A. You say --
Q. When you're saying yes, you mean yes, he didn't mention it, right?
A. Yes.
Q. And when you went to that Baskin-Robbins and you traveled

there to the Shell, you didn't see anyone follow you, did you?
A. No.
Q. When you got to the Shell station, Mr. Diaz wasn't there yet, was he?
A. No. He was not there.
Q. So you parked your car in the Shell station, right?
A. Yes.
Q. And then Mr. Diaz showed up shortly after that, correct?
A. That's correct.
Q. And when Mr. Diaz got there, you and Mr. Perez got out and you went to speak to Mr. Diaz, correct?
A. That's correct.
Q. All right. And while you were there at the Shell station, you never saw Alexander Vasquez before you spoke to Mr. Diaz, did you?
A. That's correct.
Q. You never saw any black car at all from where you were, did you?
A. That's correct.
Q. And Mr. Cruz -- you never heard what Mr. Perez might have said to Mr. Vasquez before Mr. Vasquez drove out to Arlington Heights, did you?
A. Excuse me?
Q. You never heard anything that Perez might have said to Mr. Vasquez before Mr. Vasquez went to Arlington Heights; you

didn't hear any of that, did you?
A. No.
Q. The conversation in the parking lot at the Shell was between you and Diaz and Perez, right?
A. What conversation are you talking about? The meeting?
Q. Yes.
A. Yes.
Q. In the parking lot at the Shell, that was when you -- just you, Diaz and Perez, right?
A. Yes.
Q. Vasquez never got out of any car, right?
A. That's correct.
Q. And during that whole conversation you didn't see him or know he was there, right?
A. That's correct.
Q. Now, during the meeting with Mr. Diaz, Diaz informed you that the cocaine was of good quality, didn't he?
A. Yes.
Q. And was that after Perez said to you ask him if it's good quality, right?
A. Yes.
Q. And once Diaz said it was good quality, he told you you are going to have to follow him if you want to see it, right?
A. After he told me it's good quality, I told him, Perez, it's good quality.

Q. Diaz said to you, if you want to see the cocaine and check it, you've got to follow me, right?
A. He told me to go from their parking lot two blocks to parking lot at the apartments.
Q. He told you you had to follow him two blocks to a parking lot at some apartments, right?
A. Yes.
Q. And Diaz then got in his car and started to drive away, right?
A. That's correct.
Q. And you got in your car to follow him, didn't you?
A. Yeah.
Q. But Perez did not get in the car with you, did he?
A. That's correct.
Q. All right. I want to take a step back from the event and I want to talk to you about your plea agreement with the government, and then we will get back to it.

You have a plea agreement with the government currently in place, isn't that right?
A. Excuse me?
Q. You signed an agreement with the government to cooperate, right?
A. Yes.
Q. And when you signed that agreement, you acknowledged understanding certain things about the charges against you,

right?
A. Yes.
Q. You said that you understood that you faced a maximum sentence of 40 years in prison, correct?
A. Yes.
Q. And you knew that without cooperation the minimum sentence was five years in prison, right?
A. Yes.
Q. Now, you also told us that you have a previous narcotics conviction, right?
A. That's correct.
Q. On a felony, right?
A. Yes.
Q. And before you signed your plea agreement, you understood that the government could use that previous conviction to file something called an 851 notice against you; you knew about that, right?
A. Excuse me. Repeat the question.
Q. Yeah.

Before you began to cooperate with the government, you knew that because of your previous conviction the government could file something called an 851 notice; you knew about that, right?
A. Yes.
Q. An 851 notice doubles the minimum sentence to ten years,

right?
A. Yes.
Q. And you certainly didn't want to get a minimum of ten years, did you?
A. Yes.
Q. And so you agreed to cooperate, right?
A. Yes, sir.
Q. And the reason you agreed to cooperate was to get a reduced sentence, right?
A. Excuse me. Repeat.
Q. Sure. I'll ask you a different way.

The reason you agreed to cooperate was so you would spend less time in jail; that was your hope, right?
A. The reason is because I said I was guilty of the charge.
Q. You agreed to cooperate because you said you were guilty of the charge, is that what you said?
A. No. Excuse me. Repeat the question. I'll answer you.
Q. Let me repeat the question so you understand.

The reason why you agreed to enter a cooperation agreement with the government is because you were hoping to get a reduced sentence, right?
A. Yes.
Q. Okay. And when you did enter that cooperation agreement, the government withdrew the 851 notice, correct?
A. That's correct.

Q. So the minimum ten years went to a minimum five, right?
A. Yes.
Q. And, in fact, it's your understanding that if you cooperate with the government successfully, that you can get a sentence less than five years even, right?
A. Yes.
Q. You said you were hoping it would be a sentence all the way down to 45 months, right?
A. Yes.
Q. Okay. 45 months is a lot better than a minimum ten years, isn't it?
A. Yes.
Q. Now, based on your plea agreement, you understand that in order to fully cooperate and get a recommendation of reduced sentence, one of the things you have to do is provide testimony whenever you are called, correct?
A. Tell the truth what happened that day.
Q. No, no, no. That's not my question.

I'm asking you, you understand that to -- part of your cooperation to get a reduced sentence, one of the things you have to do is if you get called to testify you agree that you will testify if you get called, right?
A. Yes.
Q. And the government has called you to give testimony in this case against Alexander Vasquez, correct?

A. Yes.
Q. Now, Mr. Cruz, if you didn't have anything to say about Mr. Vasquez talking to you that day, you wouldn't be able to provide any helpful testimony, would you?
MR. LEE: Objection.
THE COURT: Sustained.
THE WITNESS: Repeat the question.
MR. BRINDLEY: I'm going to have to ask a different one, Mr. Cruz.
BY MR. BRINDLEY:
Q. You understand that the U.S. Attorneys entered the agreement with the same demands that we see here today, right.
A. Regardless Vasquez was not involved. Right now I signed the cooperation and told the truth, it not have to be nothing if he be pleading guilty or not.
Q. I'm sorry, Mr. Cruz. Here is the question.
The U.S. Attorneys who you see sitting here today --
A. Yes.
Q. -- are the same ones you entered your cooperation deal with, right?
A. Yes.
Q. And you understand that these U.S. Attorneys are seeking the conviction of Alexander Vasquez in this case, correct?
A. Excuse me?
Q. You understand that these U.S. Attorneys you have to deal

with are seeking the conviction of Alexander Vasquez in this case, correct?

A. Seeking?

Q. What's that?

A. You say seeking the conviction.

Q. Yes.

A. Producing, going about the case.

Q. You wouldn't agree that you understand they are prosecuting him?

A. Yes.

Q. Okay. Now, you said repeatedly that all you have to do is tell the truth. You've said that a couple of times now to get a recommendation of a reduced sentence, right?

A. Yes.

Q. Mr. Cruz, have you -- well, let me ask you this question first.

You have spoken to federal agents about Alexander Vasquez on multiple occasions, haven't you?

A. Yes.

Q. When speaking to federal agents about Alexander Vasquez, have you always told them the truth?

A. When I was arrested I lied to them.

Q. Okay. Let's talk about that.

You were arrested on August 5th, weren't you?

A. Yes.

Q. You were interviewed on August 5th, weren't you?
A. Yes.
Q. And when you were interviewed, you told Agent Chupik that you met with Alexander Vasquez before you went to Arlington Heights, didn't you?
A. Repeat.
Q. Yes.
When you were interviewed by Agent Chupik on August 5th, after you got arrested you told Agent Chupik then on August 5th that you actually met with Mr. Vasquez before you even went to Arlington Heights, you told him on the 5th, right?
A. Yes.
Q. But you just told this jury that that's not true, right?
A. By the time I got arrested, that's what I say.
Q. By the time you got arrested, that's what you say, but it was a lie, wasn't it?
A. I had been arrested that day.
Q. What?
A. I just been arrested that day.
Q. So whenever you get arrested, you feel it's okay to lie to the agents?
A. In a moment I just told them, because the agents told me they already got me and that one down there.
Q. The agent told you that they already had you and Vasquez, and so you said okay, well, I met with Vasquez, right?

A. No, I don't say.

They told me that they already -- they know that I gone down there to make a dope deal with Alexander Diaz.

Q. So the agent told you they already know you were going to make a deal with Alex Diaz, right?

A. At the time they were recording my phone calls with Alex Diaz.

Q. You said he was doing a dope deal with Alexander Diaz, right?

THE COURT: Overruled.

BY MR. BRINDLEY:

Q. Right?

A. Yes.

Q. And after he said that to him, you decided to say well, I met with Alexander Vasquez before we went to Arlington Heights, right?

A. Right.

Q. And the reason you said that is because you were trying to find somebody else to blame instead of just you, right?

A. I just told him what they want to know at that time.

Q. You told him what you thought he wanted to hear at the time, right?

A. Yes.

Q. And now you have entered into a cooperation deal with this government, correct?

A. Yes.
Q. And the same agent that you talked to on August 5th when you lied about Alexander Vasquez is seated at this table, correct?
A. Yes.
Q. Okay. And so here in court today you continue to try to tell him what he wants to hear, correct?
A. No, sir.
Q. So today you are telling the truth about Alexander Vasquez, but before you lied, is that right?
A. Yes.
Q. Well, if you lied about what Mr. Vasquez was doing in this same set of events before, then there is no good reason why anybody should trust you now, is there?
MR. LEE: Objection.
THE COURT: Sustained. Arguing with the witness.
MR. BRINDLEY: I apologize, your Honor.
THE COURT: It's not a question of apologies. It's the form of the question.
BY MR. BRINDLEY:
Q. Now, you said that after the deal or after the discussion with Diaz in the Shell parking lot, Diaz drove away, correct?
A. Yes.
Q. Okay. And he drove away and then you got in your car to follow him, right?

A. Yes.
Q. But Mr. Cruz -- I'm sorry -- Mr. Perez, he didn't get in with you, did he?
A. That's correct.
Q. You started driving to the exit anyway, didn't you?
A. No. When I was going to the car I told Perez to get in the car. He said no, I call somebody else to come pick me up.
Q. Okay. So what you are saying is Perez said I called somebody else to come and pick me up; that's what he told you?
A. Yes.
Q. And so he didn't get in the car, right?
A. No.
Q. You met with the agents and talked to them on April the 21st of this year, didn't you?
A. Excuse me?
Q. You met with the agents and talked to them on April 21st of 2009 before you entered your plea agreement, correct?
A. Yes.
Q. And during that conversation, you told the agents that after you got in your car you realized that Perez had walked over to a black car, right?
A. I told him that he was walking to the parking lot.
Q. Right.

You didn't tell them anything about him saying oh, I told this -- I said somebody else was going to pick me up that

day, did you?

A. Excuse me?

Q. You didn't tell them anything about Perez making this statement, I called somebody else to pick him up; you didn't tell them anything about that on the 21st of April, did you?

A. At that moment I was -- remember what happened at that day.

Q. So you didn't remember at that time?

A. Yes.

Q. But now it comes time to get cooperation, you remember, correct?

A. At the time we keep going over the days, I remember really what happens that day.

Q. Let's talk about your memory of what really was happening that day.

You said today in court that Alexander Vasquez spoke to you when you went over to that black car, right?

A. Yes.

Q. You said -- and I want to talk to you about what -- how that happened.

You're saying that you went over to the car, right?

A. Um-hum.

Q. And this is after you drove all the way to the exit without Perez, right?

A. Excuse me?

Q. I want to back up and do some events before we get to the car here.

You got in your car and you started to drive to the exit of the gas station?

A. Right.

Q. To follow Diaz?

A. Yes.

Q. Without Perez, right?

A. That's correct.

Q. The truth is the reason you were doing that is Perez had already called this deal off, isn't that the truth?

A. No.

MR. LEE: Objection.

THE COURT: The answer may stand.

BY THE WITNESS:

A. When I told him to come with me, he told me he called somebody to pick me up. I told him follow me.

BY MR. BRINDLEY:

Q. You told him.

And all that stuff about you telling him to come pick you up, and him telling you to come -- that he had someone to pick him up, and you telling him to follow you, you didn't mention that to the agents when you met with them on April of 2009, did you?

A. No.

Q. That's something new we just find out about here today, right?
A. Today?
Q. Yes. Here in court.
A. I mention to them already.
Q. Huh?
A. I mentioned that before.
Q. I see.
Well, you said that Mr. Perez called you, right?
A. Mr. Who?
Q. Mr. Perez, he called you after you were going to the exit?
A. Yes, sir.
Q. And he told you to come back over to this car. That's what you said.
A. He told me to come back.
Q. Of course, you never heard any recording in this case of that call, right, the call between you and Perez?
A. No.
Q. So you don't have any way to prove what it is that he said to you, right?
A. He told me to come back.
Q. Okay. That's what you say he said, correct?
A. That was the words he told me.
Q. And then you went back over to the black car, right?

A. Yes.
Q. And while you were over at the black car, Diaz called you on the phone, right, when you were standing in the passenger door, right?
A. Yes.
Q. And while you were on the phone with Mr. Diaz you said Mr. Vasquez was in the driver's seat, correct?
A. Yes.
Q. And Mr. Perez was in the passenger's sheet, correct?
A. Yes.
Q. And Diaz was on the phone, right?
A. When I approached to the car, Perez apologized to me.
Q. He apologized to you.
And he said he was sorry that he didn't tell you that someone was coming to pick him up, right?
A. Yes.
Q. He did not tell you that the man in the car had anything to do with the drug deal at that time, did he?
A. Well, I went there. He just apologized to me.
Q. And so he said I'm sorry I didn't tell you somebody was going to pick me up. But he didn't say that the man in the car had anything to do with the drug deal, did he?
A. At the moment, no.
Q. Okay. Now, when you got Diaz on the phone, what you said was that Mr. Perez said to you tell him to go get the kilo and

bring it back here, right?
A. Yes.
Q. Okay. And then after Perez said that, the very next -- a second later, you said that Alexander Vasquez then repeated the exact same words, tell him to go get it, we have the money, and bring it back, right?
A. No.
Perez told me to bring the kilo to the gas station. Perez. Alex didn't say nothing.
Q. Alex didn't say anything?
A. Perez was, where is the money? Perez told me tell him we got the money. Vasquez -- I told them both at the same time, said we got the money here.
Q. So Perez says tell him we have the money here, right?
A. Yes.
Q. And then Vasquez is sitting right there next to him, right?
A. Yes.
Q. And you didn't have any evidence to suggest that Mr. Vasquez had a hearing problem, did you?
MR. LEE: Objection.
THE COURT: Sustained. Form of the question.
Disregard the question.
THE WITNESS: Repeat the question.
THE COURT: Disregard the question.

MR. BRINDLEY: I'll ask you a different question.

BY MR. BRINDLEY:

Q. Right after Mr. Perez said tell them we have the money, then it's your testimony that Mr. Vasquez repeats the same words, is that right?

A. At the same time. Both of them at the same time.

Q. On August 5th, 2008, when you were interviewed by the agent, you didn't mention that Alexander Vasquez said anything to you at the Denny's parking lot, did you?

A. Yes. Correct.

Q. Okay. And on August 5th, 2008, that was the day when you were lying about Mr. Vasquez to incriminate him, right?

MR. LEE: Objection.

THE COURT: Overruled.

You may answer.

BY MR. BRINDLEY:

Q. Right?

A. By the time the agent, yeah, I lied to them.

Q. So even on a day when you were lying about him, you didn't mention that he spoke to you over at the Denny's parking lot, did you?

A. I was just been arrested. It was a lot of things going through my mind.

Q. So you forgot about it that day?

A. At that moment, yeah.

Q. Okay. That was before you entered your cooperation agreement obviously, right? August 5th.
A. Yes.
Q. Okay. April 21st, 2009, you met with the agents again, didn't you?
A. Yes.
Q. And during the meeting on April 21st, 2009, you discussed with Agent Chupik what happened at the Denny's parking lot on August 5th, didn't you?
A. Yes.
Q. And on April 21st you told him that Perez talked to you and told you that they had the money and he was supposed to bring the kilogram back. You told them that on April 21st, right?
A. Yes.
Q. Well, on April 21st, 2009, you still never mentioned anything about Alexander Vasquez saying a word to you while you were in the Denny's lot, did you?
A. After that keeping going, I start remembering things, yeah.
Q. You didn't tell them that on the 21st at all, did you?
A. Yes.
Q. You are agreeing with me, right?
A. Yes.
Q. So you forgot it again, correct?

A. That's correct.
Q. All right. And then you signed the cooperation deal on April 29th of 2009, correct?
A. Correct.
Q. All right. And following that, you were interviewed again by the agents on August 12th of this year, just a few weeks ago, right?
A. Correct.
Q. And on August 12th you were asked specifically about Alexander Vasquez, correct?
A. Excuse me?
Q. On August 12th, they asked you specifically questions about Mr. Vasquez, correct?
A. That's correct.
Q. And on August 12th, 2009, you still didn't remember to say anything about him talking to you in the Denny's parking lot, did you?
A. Excuse me. Repeat the before question.
Q. Okay. August 12th, 2009, you met with the agents, right?
A. August 12, yes.
Q. And talked to them on that day about Mr. Vasquez, right?
A. Yes.
Q. But on the 12th, on that day you still didn't tell them anything about Mr. Vasquez talking to you by that black car, did you? Not on the 12th.

A. Yes.
Q. Okay. And, in fact, Mr. Cruz, it wasn't until August 20th, a week before this trial, on August 20th you were visited at the MCC, the jail where you reside, you were visited there by Agent Chupik, right?
A. Yes.
Q. The same agent who you lied to tell what he wanted to hear on August 5th, right?
A. August 5th.
Q. You said you lied to him to tell him what he wanted to hear on August 5th. It's the same guy you saw at the jail on the 20th, right?
A. Yes.
Q. And the U.S. Attorneys who you are looking to to recommend your reduced sentence, they came over there on August 20th as well, correct?
A. Correct.
Q. And by that point on August the 20th, you knew that you were going -- to do your cooperation, you were going to have to testify against Alexander Vasquez at this trial, correct?
MR. LEE: Objection, your Honor.
THE COURT: Overruled.
You may answer.
BY THE WITNESS:
A. Yeah, I know.

BY MR. BRINDLEY:

Q. Mr. Cruz, the only time that you were even close enough to Alex Vasquez to speak with him on August 5th was when you were over by that black car, right?

A. Yes, sir.

Q. Okay. So when the agents and the U.S. Attorneys came over to talk to you a week before this trial, all of a sudden, for the first time, you remembered that Mr. Vasquez spoke to you over by the black car, right?

A. It was before I get to the MCC. The MCC, really nothing happened there.

Q. Nothing happened in the MCC?

A. Yeah.

Q. You didn't tell them that that day?

A. Nothing.

Q. You didn't tell them that day?

A. That day we didn't have no time. They cancelled the visit and everybody have to leave.

Q. The day before then, the 19th, that's when you spoke with them, right?

A. No. I already spoke with them about Alexander Vasquez before that day.

Q. The first time, Mr. Cruz, that you ever spoke to them about him talking to you at the black car, that specific thing, was during the meetings on August 19th and August 20th?

A. It was before.
Q. It was before. You are sure?
A. Yeah.
Q. Okay. You understand, Mr. Cruz, that the agents make reports of when they talk to you about what you tell them, right?
A. Excuse me?
Q. You understand that the agents make reports of when they talk to you and what you tell them during your meetings, right?
MR. LEE: Objection.
THE COURT: You may answer if you know.
BY MR. BRINDLEY:
Q. Right? You know that.
A. It was nothing reported because we are talking about what happened that day.
Q. Sir?
A. We don't make nothing up.
Q. Sir, I'm not -- you're answering a question nobody asked.
What I'm asking you is whether you understand that the agents keep reports of when they meet with you and what you say. Do you know that?
A. Keeping report?
Q. Do you know if they write reports of when they meet with you and what you say? Do you know that or not?
A. Yes.

Q. And so knowing that, is it still your testimony that you mentioned him talking to you by the black car before the 19th?
A. I told them.
Q. Okay. On the 19th, right? At the U.S. Attorney's Office, right?
A. Before the 20th, they told me, yeah, I already mentioned that I spoke to him.
Q. And the time you mentioned it it was the day before the 19th at the U.S. Attorney's Office, correct?
A. Before that.
Q. Before that. And you're sure?
A. Yeah.
Q. All right. So, Mr. Cruz, either way, you forgot about this entire conversation with Alexander Vasquez by the black car, you forgot about it from August 5th, 2008, until a couple of weeks before this trial, you forgot to mention it. That's true, isn't it, at the best?
A. It was way back I mentioned him.
Q. Way back?
A. Yeah. Because when they start to ask me, I start to remember. I then told them what the conversation had between me and Vasquez.
Q. Okay. And you did that way back. When?
A. In the beginning. When I plead guilty.
Q. You just told me that on April 21st, 2009, when you met

with them before you pled guilty, you just told us ten minutes ago that you didn't mention anything about this conversation, right?

A. Yeah. After -- after I plead guilty, when I meet with them, I mention it.

Q. I see.

So after you had your cooperation agreement, right?

A. Yes.

Q. Then you say that there was this conversation, right?

A. Yes.

Q. But if you were going to report a conversation with Alexander Vasquez to try to help the government, the only time you could make it was right there at that car, right?

MR. LEE: Objection, your Honor.

THE COURT: Do you understand that question the way it's put to you?

THE DEFENDANT: No.

THE COURT: Rephrase the question.

MR. BRINDLEY: Yes.

BY MR. BRINDLEY:

Q. Mr. Cruz, if you are going to say anything about Alexander Vasquez that will help the government, about a conversation, it had to happen when you were by the car because that's the only time?

A. Yeah. That's the only time, what happened in the car.

Q. So after you agreed to cooperate, after you started seeking a reduced sentence, then you said that, right?
A. Yes.
Q. Mr. Cruz, have you lied about other things in this case?
A. Excuse me?
Q. Have you lied about other things in this case?
A. Did I lie?
Q. Have you lied in this case about other things?
A. I'm here to tell the truth what happened that day.
Q. I know that's what you are saying to us now. But I want to talk to you about what happened on August the 5th, when you were interviewed by the U.S. Attorneys.
A. When I was what?
Q. August 5th -- not the U.S. Attorneys. That's a mistake on my part. August 5th, when you were interviewed by the agents, Agent Chupik and probably another law enforcement officer, right?
A. Yes.
Q. On August 6th, 2009, you signed an affidavit swearing that no one read you your right to a lawyer that day, correct?
A. Yes.
Q. And you would not swear to a fact under oath unless you were sure it was true, right?
A. Yes.
Q. And you did swear to that when you signed the affidavit,

correct?
A. Yes.
Q. But then, Mr. Cruz, approximately a week before this trial when you went to the U.S. Attorney's Office on August 19th, you told them that you might have been read your right to a lawyer, didn't you?
A. Excuse me?
Q. You told them that maybe you had been read your rights, correct?
A. I said at that moment it was three or four agents talking to me, and I didn't hear. If they said, I didn't hear it.
Q. So you're saying -- now what you're saying is maybe they read you your rights, but you just missed it, is that correct?
A. It was three or four agents talking at the same time.
Q. So you are saying they might have read you your rights, and you didn't hear them. Is that what you are saying?
A. I was looking around.
Q. You didn't hear them because you were looking around?
A. In the moment that they were interviewing, they said I was looking around. It was three or four agents talking to me.
Q. So you did hear them saying, but you were looking around?
A. If they said it, I didn't hear.
Q. So you are saying they might have said it, but you don't know?
A. I remember they probably said it. Probably not.

Q. You don't know, right?
A. At that time.
Q. No, at this time. At this time. You are saying you don't know?
A. They said it; I didn't hear at that time.
Q. They said it?
A. If they said it --
Q. If they said it, you didn't hear it at that time, right? Right? That's what you are saying?
A. If they said it and I was asking four or three agents, yeah.
Q. Okay. So you're not sure whether they said it or not, is that fair?
A. Yes.
Q. Okay. But in the affidavit that you signed on March the 6th of 2009 and presented to this Court, you swore that they did not give you your rights, correct?

MR. LEE: Objection, your Honor.

THE COURT: You may answer.

BY MR. BRINDLEY:

Q. Correct?
A. Yes.
Q. And you just told me you wouldn't swear to anything unless you were sure it was true, correct?
A. Yes.

Q. But you also just told me that you actually don't know whether they read you your rights, correct?
A. Correct.
Q. And when you said that they did not read you your right to a lawyer, you were under an oath then when you signed that, right?
A. Yes.
Q. And the reason you signed it was because you were trying to get your post-arrest statement, the statement you made on August 5th, you were trying to get it suppressed from evidence, right?

MR. LEE: Objection, your Honor.

THE COURT: You may answer.

BY MR. BRINDLEY:
Q. That's what you were doing that for, right?
A. I put them -- I didn't get a chance to draft the statement, right.
Q. You were trying to get a chance to draft your statement, right?
A. Yes.
Q. Because you thought that would help your case, right?
A. Yes, sir.
Q. And today, Mr. Cruz, you have come into this court and you have taken another oath, correct?
A. Yes.

Q. And giving your testimony to pursue that plea agreement for reduced sentence, you are trying to help yourself again, correct?
A. At that moment I was thinking that was the best for helping on my case, yes.
Q. No, no, no. Today. Now. Today you took an oath, correct?
A. Yes.
Q. And, Mr. Cruz, today when you are giving your testimony here as part of your agreement, you are doing it to try to help yourself, correct?
A. I'm doing it because telling the truth and cooperate to reduce some time of my sentence.
Q. So you are telling the truth; that's why you are doing it?
A. Yes.
Q. And getting a reduced sentence, that was the last part, wasn't it?
A. Yes.
Q. And, Mr. Cruz, you admitted earlier that you had lied about Mr. Vasquez previously, correct?
A. In 2008, yes.
Q. Okay. And so failing to tell the truth didn't stop you from getting a cooperation agreement, did it?
A. Excuse me?

MR. LEE: Objection, your Honor.

THE COURT: You may answer.

BY MR. BRINDLEY:

Q. Lying previously didn't stop you from getting a cooperation agreement with the government, did it?

A. That was in 2008 when I lying to them.

Q. I know. Just answer the question I'm asking you.

Lying in 2008, telling the agent what they wanted to hear, that didn't stop you from getting a cooperation agreement in this case, did it?

A. Why didn't stop me?

Q. Even though you lied in 2008, you still got to sign a cooperation agreement with the government, is that true?

A. Because I plead guilty and I said might as well help myself.

Q. Sir, just answer the question.

Even though you lied about this man before, you still got to sign an agreement for a reduced-sentence plea agreement --

A. Yes.

Q. -- in this case with the government, right?

A. Yes.

Q. And you still were permitted to come in here and take an oath and testify, correct?

A. Yes.

MR. BRINDLEY: Nothing else, your Honor.

THE COURT: Redirect.

MR. LEE: May I have a moment, your Honor? Brief moment?

THE COURT: Yes.

REDIRECT EXAMINATION

BY MR. LEE:

Q. Mr. Cruz, defense counsel Mr. Brindley just asked you a lot of questions about your prior discussions with law enforcement agents, including Agent Chupik.

A. Yes.

Q. When was the first time you met Agent Chupik?

A. The day of the arrest.

Q. And about -- where did you meet him?

A. In Arlington Heights.

Q. And where in Arlington Heights did you meet him?

A. In the moment of the arrest.

Q. And what did you have -- did you talk to him at that time?

A. When they give me the arrest?

Q. Yes.

A. No. I talked to him in the police station.

Q. All right. And about when was that in relation to the arrest?

A. Excuse me? Repeat.

Q. About how much time was there between the arrest and your talking to Agent Chupik at the Arlington Heights police station?

A. When they arrest me, they take me in a police car to the Arlington Heights police department.

Q. And, again, about how much time had passed?

A. 20 minutes, 25 minutes.

Q. Now, when you -- you were asked earlier about -- strike that.

When Agent Chupik began talking to you at the Arlington Heights police station, did he read you anything?

A. They came, another agent came and asked me for my mother and my father information.

Q. And did they read you anything after that?

A. At that moment I was looking around with three or four agents talking to me.

Q. Did they give any documents to you?

A. They bring a paper.

Q. Did you look at that paper?

A. No.

Q. Were you asked to sign anything?

A. Told me to sign it.

I said I'm not going to sign nothing or record nothing.

Q. Now, Mr. Brindley asked you about an affidavit you filed

earlier this year.
A. Yes.
Q. And in that affidavit what did you say?
A. I said that I didn't hear that day they read me my rights.
Q. And just now you talked about how you're not sure as to what happened in terms of the reading of the rights.
A. Yes.
Q. Is that right?
A. Correct.
Q. Why -- why are you not sure now, when you were sure earlier that you had not been read your rights?
A. Because at that moment I being arrested, I'm confusing what's going on, you know, and it's three or four agents asked me questions. And if they said, I didn't hear it.
Q. Have you had an opportunity to think more about what happened between the time you filed the affidavit and your coming here to court?
A. Yes.
Q. And have you --
A. I was -- I realized, you know, that they said it, I didn't hear it. And that was one of the changes that I put in the affidavit to try to dismiss my charge.
Q. Now, is there anything that made you less sure about whether or not the agents read you your Miranda rights?

A. Like I say, I was looking around. If they said it at that time, I was so confused about being arrested, and I didn't hear it, you know.

Q. I think my question is a little bit different.

Between the time you filed your affidavit and your coming here to testify, is there something that happened that made you less sure about whether or not you were read your Miranda rights?

A. Yes.

After I signed the affidavit, and I hear the affidavit here, and hear this testimony, he probably, they read it to me.

Q. What do you mean by: here, here, here?

A. In the hearing, when listen to the affidavit here in court.

Q. What do you mean by "listen to the affidavit"?

A. We -- the Judge had said the affidavit, and we proceed for I get it or not.

Q. I'm sorry. I didn't quite understand that.

What do you mean? What happened?

A. When I put the affidavit for the Judge and hear the testimony of Mr. -- the agent, then I realize that he probably told me my rights.

Q. Sitting here today, do you know whether or not Agent Chupik read you your Miranda rights?

A. If he read it to me I didn't hear it at that time.
Q. So what happened after going back to August 5th, 2008, what happened after you were shown this document that you did not review?
A. Excuse me. Repeat the question.
Q. Going back to August 5th, 2008, at the Arlington Heights police station, what happened after the discussion you were talking about before, how they asked you about your parents and they showed you a document that you did not review?
A. Yeah. They asked me about my father, my mother information. I give it to them, the number. And I signed that paper for the information for my father and my mom.
And they asked me where I was going down there, what I was doing.
Q. And what happened, did you say?
A. I said why I have to told you, because you already know.
Q. And how did they respond?
A. They said we know that you are here to make a dope deal with Alex Diaz, and then the guy with you.
Q. And then what did you say?
A. I said call the courts. If you already know, why I have to tell you more?
Q. Did you at some point in your discussion with the agents tell them what you were there -- why you were there in Arlington Heights that day?

A. Yeah, I told him that I was there to make a deal with Alex Diaz and Joel Perez.
Q. And did you -- what did you say -- strike that.
And why did you say that you were there in terms of Alex Diaz and Joel Perez?
A. Because they asked me about who was the one in the car came with me.
Q. And is that when you mentioned Joel Perez?
A. Yes.
Q. Now, did they ask you any questions about Alexander Vasquez?
A. At that moment, yeah.
Q. And what did you say?
A. I said I just meet him there. I don't know nothing about him.
Q. About how long were you talking to the agents that day?
A. 20 minutes.
Q. And at that point -- strike that.
Now, turning your attention to April 21st, 2009, on that date did you talk with members of the U.S. Attorney's Office and the Drug Enforcement Administration?
A. Yes.
Q. And was this before you pled guilty to the charge in this case?
A. Excuse me?

Q. Was this before you pled guilty to the charge in this case?
A. Yes.
Q. And then did you plead guilty about a week later after you talked to the government?
A. Yes, sir.
Q. And about how long was that meeting with members of the U.S. Attorney's Office and the Drug Enforcement Administration?
A. A couple of hours.
Q. And prior -- and after that, when was the next time you talked to the government?
A. When they call me.
Q. And when was that?
A. I don't remember the date.
Q. About how long ago was it compared to now?
A. From the 21st -- well, we have a multiple visit there.
Q. And over the course of these meetings, did the government ask you questions about this case?
A. Yes, sir.
Q. And over the course -- and over the course of these meetings, did you try to answer the questions to the best of your ability?
A. Yes, sir.
Q. And Mr. Brindley asked you about certain things you told the government recently that you did not tell them before. Why

is that?
A. Because at the time I was going to interview with you guys, it was coming back little by little, the thing that happened that day. It's been a year already.
Q. Going back to August 5th, 2008, when you told the agents -- did you tell the agents about Alexander Vasquez during that meeting, that interview?
A. I didn't tell them nothing. Just told them that I don't know nothing about him. Just when I went to the parking lot.
Q. And what did you mean by that?
A. Well, was the first time I met him there right in the parking lot.
Q. When you met him in the parking lot, that was the first time you met, right?
A. Yes.
Q. And when you met in the parking lot, did you have an understanding as to whether or not he was involved in the deal?
A. After I went to the car, he had to be already -- in other words, why was he there.
Q. What made you think that?
MR. BRINDLEY: Objection. Speculation.
THE COURT: Overruled.
You may answer.
BY THE WITNESS:
A. Because when I approached the car, the black car, Joel

Perez apologized to me.

BY MR. LEE:

Q. And, again, how did that -- how did that affect your understanding of what Alexander Vasquez was doing?

A. Excuse me. Repeat the question.

Q. How did Mr. Perez's apology affect your understanding of why Mr. Vasquez was there?

A. Because when I talked to Mr. Perez, I told him don't bring no money, don't bring nobody else, and he apologized to me because he told me I forgot to tell you that I call somebody to come down here to pick me up.

Q. So just to clarify -- well, is there anything else that happened that made you think -- believe that Mr. Vasquez was part of this deal?

A. Yeah. After the conversation between me, Perez, and Diaz, after we finish talking that conversation he is supposed to bring to the gas station, Alexander Vasquez say I'm down here because he call me. If I don't come down here, he get mad at me.

Referring to Perez.

Q. So when you told the agents on August 5th that you didn't know anything about Alexander Vasquez, what did you mean?

A. About outside of the agreement I got with Perez, that was what I -- me and him spoken in the car.

Q. So did you know that was -- I'm sorry. Could you say

that again?
A. When -- by the time I told that the agreement between me and Perez was to bring nobody, no money, when I'm in the car right there with him, I already know that he had to know why he was there.
Q. Mr. Cruz, Mr. Brindley asked you some questions about your agreement with the government.
And, again, what is your understanding of how you can get this reduction in sentence that you said you are hoping to get?
A. To cooperate and tell the truth.
Q. And who ultimately decides if you have been telling the truth?
A. The Judge.
MR. LEE: May I have a moment, your Honor?
THE COURT: Yes.
BY MR. LEE:
Q. Mr. Cruz, what is your understanding of what would happen to your deal if Mr. Vasquez, the defendant, is found not guilty in this case?
A. Still get the benefit.
Q. And why would that be?
MR. BRINDLEY: Objection. Speculation, your Honor.
THE COURT: All right. Do you understand the question the way it's put to you?

THE WITNESS: Repeat.

BY MR. LEE:

Q. What is your understanding of what would happen if -- to your deal if Mr. Vasquez is found not guilty?

A. As long as I cooperate and tell the truth, I get the benefit. No matter that he get sentenced or not.

Q. What is your understanding of what would happen to your deal if Mr. Vasquez was convicted but you were found to have lied?

A. Excuse me. Repeat the question.

Q. What is your understanding of what would happen to your deal if Mr. Vasquez was convicted but you were found to have lied to this jury?

A. At the recommendation, that can be by you, that I lying it would be dropped.

THE COURT REPORTER: Would you say that again.

BY THE WITNESS:

A. He get convicted and I'm lying, the agreement would be dropped.

BY MR. LEE:

Q. So does your agreement depend on whether or not Mr. Vasquez is convicted?

A. As long as I cooperate and tell the truth, it's my agreement.

MR. LEE: Thank you.

THE COURT: Proceed.

MR. BRINDLEY: Thank you.

RECROSS EXAMINATION

BY MR. BRINDLEY:

Q. Mr. Cruz, you were just talking about your plea agreement, and your understanding of it.

You understand that in order for you to get the reduced sentence, the people that decide whether to make the recommendation are the U.S. Attorneys, right?

A. Yes.

Q. The ones prosecuting the case, right?

A. Excuse me?

Q. The ones prosecuting this case?

A. Repeat the question.

Q. Yeah.

The U.S. Attorneys who are going to make the recommendation you are seeking, they are the ones prosecuting Mr. Vasquez, right?

A. Yes.

Q. And if you give testimony that leads to a conviction in the case they are prosecuting, you don't think they are going to turn you in for lying to anybody, do you?

MR. LEE: Objection.

THE COURT: All right. Sustained.

THE WITNESS: Repeat the question again.

MR. BRINDLEY: I will move to the next question, sir.

THE COURT: This is a point of clarification.

The prosecution in this case is not brought by an individual or two individual Assistant United States Attorneys. The prosecution is brought by the United States through the Office of the United States Attorney.

Proceed.

MR. BRINDLEY: Thank you, your Honor.

BY MR. BRINDLEY:

Q. Now, Mr. Cruz, a minute ago you were talking to the government, they were talking -- Mr. Lee -- or they were talking about -- or, he was talking about when you signed this affidavit swearing that you were not advised of your right to a lawyer.

And you said that when you signed that affidavit you signed it because you thought it might help get your case or get your charge dismissed?

A. Yes.

Q. Okay. But it didn't work, did it?

A. I was denied.

Q. Right.

Your motion to get the charge dropped was denied, right?

A. Yes.

Q. Okay. And after it was denied, you knew you needed to do

something else, right?

A. To do something else like what?

MR. LEE: Objection.

THE COURT: Side bar.

MR. BRINDLEY: Yes.

(Proceedings heard at side bar:)

THE COURT: These questions are misleading.

You must be careful the way you put them to the witness. This was not a motion to get the indictment dismissed or the charges dropped. It was a motion to suppress the statement.

And there is a substantial difference.

Now, it's difficult to know how the jury will deal with this kind of an inquiry. But, as an attorney, you must be a little bit more precise when you put these questions to the witness.

They are confusing and they may or may not be confusing to the witness. But, certainly, they are confusing to the jury if they think that somehow what he did was to ultimately get an indictment dismissed, when the nature of it was a motion to suppress a statement, which, even if granted, would not necessarily lead to a motion for the dismissal of the indictment.

MR. BRINDLEY: I'll ask a more precise question, your Honor. I see your point.

THE COURT: All right. So they may be confusing to the witness and, indeed, they may be confusing to the jury.

Just as in the last instance, to give the impression that somehow the prosecution is brought by two individual Assistant United States Attorneys, when you well know they merely are trying the case, when the action is brought by the United States and the Office of the U.S. Attorney.

All right. Proceed.

MR. BRINDLEY: Yes, your Honor.

(Proceedings heard in open court:)

BY MR. BRINDLEY:

Q. Mr. Cruz, after your motion to suppress the statement you made on August the 5th was denied, it was after that that you decided to plead guilty, right?

A. Yes.

Q. Okay. And it was after -- and the affidavit that we talked about, that was signed when you were trying to get the statement suppressed. That's what the motion is for, right?

A. Yes.

Q. And after that was denied, that's when you decided to enter into an agreement to cooperate with the government, right.

A. No. I -- after the Judge put a date for me for trial, me and my lawyer sit down and went over the evidence they got against me.

Q. You didn't sign the plea agreement in this case until after your motion was heard, correct?
A. Yes.
Q. Now, going back to what you said about Mr. Vasquez on August 5th, when Mr. Lee asked you the question about what you said about Mr. Vasquez on the 5th, you said that you told the agent that you didn't know anything about him, right?
A. Yes.
Q. But when I was asking you the questions just a little bit ago, you told me that you told the agent that you met with Mr. Vasquez before you went to Arlington Heights, and that was a lie, right?
A. Yes.

MR. BRINDLEY: No further questions.

MR. LEE: Very briefly, your Honor.

THE COURT: Proceed.

FURTHER REDIRECT EXAMINATION

BY MR. LEE:
Q. Mr. Cruz, when you were talking to the agent on August 5th, 2008, did you tell the agents that you had met with Alexander Vasquez in Chicago before coming to Arlington Heights?
A. Repeat the question.
Q. When you were talking to the agents on August 5th, 2008, did you tell the agents that you had met Alexander Vasquez in

Chicago before coming to Arlington Heights?
A. Yes.
Q. What did you tell -- why do you --
A. I told them that, the moment they asked me about him I don't know nothing about him. Only the things when I went to the parking lot.
Q. Okay. So I'm just trying to make sure it's clear. It seems like there is -- what did you tell them about when you first met Alexander Vasquez?
A. I met him right there in the parking lot.
Q. Sir, let me just back up to my previous question.
When you were talking to the agents on August 5th, 2008, in the Arlington Heights police station, did you tell the agents that you had met with Alexander Vasquez in Chicago before you came to Arlington Heights?
A. Before?
Q. Right.
A. Yes.
Q. It sounds like -- I just want to be clear. I'm sorry. I think I'm a little confused. I just want to be clear.
When did you tell the agents you first met Alexander Vasquez?
A. In the parking lot.
MR. BRINDLEY: Objection. Asked and answered.
THE COURT: Overruled. The answer may stand.

BY THE WITNESS:
A. In the parking lot.
BY MR. LEE:
Q. Did you yourself tell the agents that you had met Alexander Vasquez in Chicago before coming to Arlington Heights?
A. Before?
Q. Yes.
A. That day, I don't remember clear.
Q. You mentioned before that the agents were asking you questions about telling you -- that you said that you already know what happened.

During this discussion with the agents, who was talking more in that discussion? Were they asking you, were you answering the questions, or were you agreeing with some of the things they were saying?
A. They -- they asked me questions and I just told them why I have to give you more information that you already have.

MR. LEE: Nothing further, your Honor.

MR. BRINDLEY: Nothing from the defense, your Honor.

THE COURT: All right. You may step down, Mr. Cruz.

(Witness excused.)

THE COURT: All right. Members of the jury, we will stop for the day. You are to return tomorrow morning at 10:00 o'clock.

The usual admonitions. You are free to go.

Counsel, remain for a few minutes.

(Jury out.)

THE COURT: All right. Mr. Cruz, you can step down.

The jury has left the room.

Who is your next witness, counsel?

MR. LEE: I believe it will be DuPage County Detective Dan Raysby, the witness who has -- will testify regarding 404(b) evidence.

THE COURT: And then after that witness?

MR. LEE: I believe we will have two or three Arlington Heights officers. We don't expect those to be very long.

THE COURT: Occurrence witnesses.

MR. LEE: Excuse me?

THE COURT: Occurrence witnesses?

MR. LEE: Yes. Regarding the arrest.

THE COURT: All right. That's sufficient.

I won't hold you any longer. See you tomorrow at 10:00.

MR. BRINDLEY: Thank you, your Honor.

(Proceedings adjourned at 5:15 p.m. to 10:00 a.m.)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	08 CR 625
	)	
vs.	)	Chicago, Illinois
	)	August 27, 2009
ALEXANDER VASQUEZ,	)	9:55 a.m.
	)	
Defendant.	)	

VOLUME 3
TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE CHARLES R. NORGLE, SR.
AND A JURY

APPEARANCES:

For the Plaintiff:	OFFICE OF THE U.S. ATTORNEY 219 South Dearborn Street 5th Floor Chicago, Illinois 60604 BY: MR. STEPHEN CHAHN LEE MS. KRUTI TRIVEDI
For the Defendant:	LAW OFFICES OF BEAU B. BRINDLEY 53 West Jackson Boulevard Suite 1605 Chicago, Illinois 60604 BY: MR. BEAU B. BRINDLEY MS. BLAIR WESTOVER
Court Reporter:	MAELLEN E. PITTMAN Official Court Reporter 219 South Dearborn Street Room 2342 Chicago, Illinois 60604 (312) 435-5576

(Proceedings heard in open court. Jury out.)

THE CLERK: All rise. Court is in session.

THE COURT: There is a note from a juror. So I'm having the juror brought into the court and I intend to have the juror read the note that he sent to me into the record.

(Juror Miller enters courtroom.)

JUROR MILLER: Over here?

THE COURT: Would you take a seat right in the jury box.

What is your name, please?

JUROR MILLER: John Miller.

THE COURT: All right. Mr. Miller, you sent a note to me.

JUROR MILLER: Um-hum.

THE COURT: The clerk is going to give it to you.

JUROR MILLER: Yes.

THE COURT: So please read it into the record.

JUROR MILLER: Okay.

"Dear Judge Norgle: I came in early today because one of the facts of the case presented yesterday substantially hampers my ability to render a fair and impartial verdict.

"The defendant, according to the car license presented in the case, lives at the 7550 West Forest Preserve Drive in Norridge.

"As I stated in jury selection in front of the

defendant, my wife teaches at Ridgewood High School. This is five blocks away from the defendant's home.

"If the defendant should be not guilty, this does not present a problem. But if he should be guilty, that would require me to be responsible for the imprisonment of a criminal who knows where my wife works and knows my name.

"My wife has already encountered drugs and drug-related violence through her work. I cannot take the risk of endangering her before a criminal who may have connections to students at the school and who lives only five blocks away.

"Sincerely, John Miller."

And I also, last night, just in case anybody cares, I Googled a map of the high school just to indicate its proximity to the address.

THE COURT: So you're fearing retribution that if you render a fair verdict in this case that the defendant is going to come and get you and your family or have someone else --

JUROR MILLER: Not me. I'm not worried for myself.

THE COURT: Do you want to stay on this jury?

JUROR MILLER: What's that?

THE COURT: Do you want to stay on the jury?

JUROR MILLER: I would prefer not to at this point.

THE COURT: All right. You are excused.

The other jurors will remain, however, and do their duty.

JUROR MILLER: Yes.
THE COURT: But you are unable to do yours, right?
JUROR MILLER: Yes.
THE COURT: You are excused.
Don't talk to anyone on the way out.
JUROR MILLER: No, I'll just go directly out then.
THE COURT: Right.
JUROR MILLER: Okay.
THE COURT: Go right out.
JUROR MILLER: Should I go this way?
THE CLERK: You can go out this way and just go to 250 and tell them you were excused.
JUROR MILLER: Room 250. Okay.
THE COURT: Your being here is vital to the administration of justice.
(Juror excused.)
THE COURT: Good morning.
MR. BRINDLEY: Good morning, your Honor.
MR. LEE: Good morning, your Honor.
THE COURT: So we do have an alternate. The alternate will step in. As soon as all the jurors are here, we will proceed.
MR. LEE: Thank you, your Honor.
MR. BRINDLEY: Thank you, your Honor.
THE COURT: One juror called earlier and said she

will be a little late. So we don't know if she is here.

Okay. There will be a brief recess.

(Recess.)

(Jury in.)

THE COURT: Good morning, members of the jury.

Prosecution ready?

MR. LEE: Yes, your Honor.

THE COURT: Defense ready?

MR. LEE: Yes, your Honor.

THE COURT: Please call the next witness.

MR. LEE: The government calls Detective Dan Raysby.

Your Honor, if I may have a brief side bar?

THE COURT: Yes.

(Proceedings heard at side bar:)

MR. LEE: Your Honor, I should have thought about this a minute ago, but I'm sorry about that.

Detective Raysby is going to talk about the 404(b) evidence we are going to discuss. I just wanted to draw your attention to that in case it might make sense to give a limiting instruction at this time before he testifies or afterwards for that matter.

MR. BRINDLEY: I agree, your Honor. A limiting instruction is appropriate.

THE COURT: The 404(b) instruction is in the final packet?

MR. LEE: It is in the packet we submitted, yes.

THE COURT: Yes. It certainly doesn't hurt, especially upon motion, to do so at an appropriate point during the course of the trial. So I will determine at what point to read that instruction.

MR. LEE: Thank you, your Honor.

MR. BRINDLEY: Thank you, your Honor.

(Proceedings heard in open court:)

THE COURT: Would you swear in the witness, please.

THE CLERK: Please raise your right hand.

(Witness sworn.)

THE COURT: Proceed.

DAN RAYSBY, PLAINTIFF'S WITNESS, SWORN

DIRECT EXAMINATION

BY MR. LEE:

Q. Good morning, sir.

Could you please state your name for the record.

A. Dan Raysby, R-A-Y-S-B-Y.

Q. And are you currently employed?

A. Yes, sir.

Q. And where are you employed?

A. DuPage County Sheriff's Office.

Q. And you how long have you been with the DuPage County Sheriff's Office?

A. 11 years.

Q. And what is your current assignment with DuPage County?
A. Right now I'm a task force officer for Immigration and Customs Enforcement.
Q. Is Immigration and Customs Enforcement, is that a federal agency?
A. Yes.
Q. Is that agency sometimes referred to as ICE?
A. That's correct.
Q. At this point, are you still employed with DuPage?
A. Yes.
Q. In the course of your time with DuPage County, what kind of assignments have you had?
A. Started off in patrol. Then I went to a TAC team, which is more of a plainclothes operation in problem areas of crime. Then I went to the narcotic unit.
Q. And have you had training in narcotics investigations in your time at DuPage?
A. Yes, sir.
Q. Detective Raysby, turning your attention to April 22nd, 2002, were you employed at that time?
A. Yes, sir.
Q. And where were you employed?
A. DuPage County Sheriff's Office.
Q. And what generally was your assignment that day?
A. I was in the narcotic unit.

Q. On that day, April 22nd, did you receive some information about a man you later learned was Alexander Vasquez, Jr.?
A. Yes, sir.
Q. And specifically, did you receive some information about Alexander Vasquez, Jr. in connection with drug trafficking?
A. That's correct.
Q. How did you receive this information?
A. From a confidential informant.
Q. Did you also receive information that day about a man who you later learned was Joel Perez?
A. Yes, sir.
Q. And did you receive information about Joel Perez in connection with drug trafficking?
A. That's correct also.
Q. And did you receive this information from the same informant you were just mentioning?
A. Yes, sir.
Q. Based on this information, did you direct the informant to do anything?
A. Yes, sir, I did.
Q. What did you have him do?
A. I asked him to place a call to one of those two subjects.
Q. And did the informant do so?
A. Yes, sir.
Q. While in your presence, did the informant speak to the

man you later learned was Alexander Vasquez that day?
A. Yes, he did.
Q. Did you personally hear these conversations?
A. Yes, sir.
Q. How so?
A. By placing my ear next to the receiver of the informant's phone, with his permission, to be able to listen.
Q. Now, as you are listening to these calls with Alexander Vasquez, do you recognize the voice at that time?
A. No, just as a male person. That's all.
Q. And at this point did you know that this man was Alexander Vasquez, Jr.?
A. No, sir.
Q. In these calls how did the informant refer to the person he was talking to?
A. Alexander Vasquez, he referred to him as Alex.
Q. Now, while in your presence, did the informant also have telephone conversations with a man you later learned was Joel Perez?
A. Yes, sir.
Q. And again, how did you hear these conversations?
A. Again, the same way, placing my ear next to the receiving device of the informant's phone.
Q. And did you recognize that voice at the time?
A. Just as another male subject. That's all.

Q. Were you able to distinguish these two voices?
A. Oh, sure. They definitely sounded different.
Q. What were -- what was the result of those conversations between the informant and Alexander Vasquez and Joel Perez?
A. The three of them agreed to meet at a certain location in order to do a four-and-a-half ounce cocaine deal.
Q. And what was that location?
A. The intersection of Grand and York, which is in the town of Bensenville.
Q. And what is that area?
A. They are shopping centers, but specifically the area we were going to be was a Dominick's food shopping parking lot.
Q. And in those conversations, did they set a time when they were going to meet?
A. The time was set up throughout the day, but eventually the meeting would have taken place around 3:00, 3:30 in the afternoon.
Q. Did you then take steps to prepare for this meeting?
A. Yes, sir.
Q. And what steps did you take?
A. We have to prepare the informant with both some money to be used and also with overhear equipment so that we would be able to listen to him inside of his truck.
Q. You mentioned some money.

How much money was the informant equipped with?

A. The informant was equipped with $4,000.
Q. And did you do anything with that money in preparation for the meeting?
A. We recorded the serial numbers so that we would know that if we recovered that money it was the same money that was given during the deal.
Q. Now I think you mentioned the "overhear device." What is that?
A. The device we used during this day was just a simple wire transmission device that goes through radio waves. We are able to listen to what is happening inside of the informant's truck real time through approximately 100 yards away is where we were sitting.
Q. Did you also search the informant at this time?
A. Searched the informant and his vehicle, yes, sir.
Q. Why did you do that?
A. So that the informant doesn't go in with any drugs, any other money besides the money that might be needed for the deal, or to make sure that the informant didn't have any weapons.
Q. Did you then go to the location you mentioned in Bensenville?
A. Yes, sir.
Q. And did the informant also go to that same location?
A. That's correct.

Q. Now -- so where was the informant? Where did the informant go to?
A. The informant was in the Dominick's parking lot at that Grand and York intersection.
Q. And was he on foot or in a vehicle?
A. I'm sorry. He was in his pickup truck, his work truck.
Q. And where were you? Where did you go?
A. I was in my truck, and I was across the street approximately a hundred yards from where the informant was.
Q. From where you were positioned, could you observe his truck?
A. Yes.
Q. Were there other law enforcement agents in the area?
A. Yes, sir.
Q. What agents?
A. There was surveillance of plainclothes personnel and then we had two fully marked squad cars in case we wanted to make a traffic stop.
Q. Later that day did a car arrive in the parking lot of the Dominick's near the informant's truck?
A. Yes, sir.
Q. What kind of car was that?
A. It was a green Ford Taurus?
Q. Could you observe anything about any people who were inside the Taurus?

A. There was two male Hispanics, one driving, of course, and one in the front passenger seat.
Q. What happened then?
A. The passenger of the green Taurus got out of his car and walked over to the informant's truck and got inside the passenger side of the informant's truck.
Q. Now as this passenger from the Taurus was going to the informant's truck, could you observe anything about that individual?
A. Just his clothing description, he was male Hispanic and his clothing description.
Q. Did you observe anything about the driver of the Taurus?
A. Just that he was a male Hispanic.
Q. And what was he doing at this time?
A. He just sat behind the steering wheel of the vehicle.
Q. Now from where you were, could you see what was happening inside the informant's truck?
A. No.
Q. Now, you earlier mentioned an overhear device, was that device operating at this time?
A. Yes, sir.
Q. And through that device were you able to hear any noise or conversation that was occurring inside the informant's truck?
A. I was able to hear the conversation between the male

Hispanic and with the informant, yes, sir.
Q. And was this in real time?
A. Yes.
Q. And what was this conversation about?
A. The conversation was that the informant wanted to get his next delivery at a cheaper price. He was to be paying $4,000 and he wanted to see if could he get it cheaper next time now that he had paid his debt.
Q. And based on your -- based on your knowledge of this investigation and your experience, what did you understand this conversation to be about?
A. He wanted to get his next delivery of four and a half ounces of cocaine lowered to $3800 is what they discussed.
Q. Now through this conversation, were you able to hear -- how many voices were you able to hear?
A. Two.
Q. And were you able to identify -- identify those voices?
A. Yes, sir.
Q. And what voices were those?
A. The one was the informant who had been working through that day, and the other one was the one that the informant had explained was Alex when we were making phone calls during the day.
Q. And so this was a voice you had heard earlier in the day?
A. From the phone calls we were making, yes, sir.

Q. About how long was that conversation inside the truck?
A. 30 seconds.
Q. What did you observe next?
A. The passenger, the male Hispanic, got out of the informant's truck and walked back to the green Taurus and sat back down in the front seat passenger side.
Q. What happened next?
A. The Taurus left the area going eastbound back towards the city.
Q. And when you say "city," do you mean Chicago?
A. Yes, sir. Sorry.
Q. At this point do you direct other law enforcement agents to stop the Taurus?
A. That's correct.
Q. And could you see that other officers did in fact stop the Taurus?
A. Yes, sir.
Q. What were you doing at that point?
A. I was keeping eyes on the informant and of course down the street on the stop, and I directed the informant to come over to where my location was.
Q. And did he in fact do so?
A. Yes.
Q. And when you met, what did he do?
A. He handed me a plastic bag of what looked like powder

cocaine, and we field-tested that cocaine right there and it tested positive as powder cocaine.

Q. When you say "field tested," what does that mean?

A. There is a little field test kit with a couple chemical vials that you just put a little bit of the substance in. You break the vials and if it's cocaine, it will show a certain color saying that the field test was positive for cocaine.

Q. Based on that field test and your training and experience, what did you think the substance in this bag was?

A. Cocaine.

Q. And were tests later done to confirm that test?

A. Yes, sir, by the lab, yes, sir.

Q. About how much was in this bag?

A. Four and a half ounces.

Q. At this point did you also search the informant?

A. Yes. And his vehicle again.

Q. Did you find anything of interest?

A. No. There was nothing illegal that he had.

Q. With regards to the Taurus, were the occupants of the Taurus at that time taken into custody?

A. Yes, sir.

Q. And were those occupants identified?

A. Yes, sir, they were.

Q. Did you have a chance to see them?

A. Yes, sir.

Q. Did you recognize either of those individuals?
A. Do I recognize them?
Q. Did you recognize either of those individuals that were taken into custody?
A. Oh, sure. The passenger I recognized as the same one that went over and met with the informant.
Q. And did you later learn -- did you at some point learn his name?
A. Yes, sir.
Q. And what was that name?
A. Alexander Vasquez.
Q. Looking around the courtroom, would you be able to recognize Alexander Vasquez if you saw him here?
A. Yes, sir.
Q. Could you identify Alexander Vasquez.
A. He is the subject sitting in the black coat with no tie and glasses, male Hispanic, black hair in between the subject on the right and the lady on the left.

MR. LEE: Your Honor, may the record reflect that the witness has identified the defendant?

THE COURT: Yes. So ordered.

BY MR. LEE:

Q. And turning to the other person, did you at some point learn his name?
A. Yes, sir.

Q. And what was that name?
A. Joel Perez.
Q. Now, when officers arrested Alexander Vasquez and Joel Perez, did officers search them?
A. Yes, sir.
Q. Were the results of that search given to you?
A. That's correct.
Q. And what were the results of that search?
A. The results were on Joel Perez, he had a little under $900 in cash; and on Alexander Vasquez, he had the $4,000, of the prerecorded funds that we had used for the buy and also another $250 or so.
Q. Just to be clear, how were you able to determine that it was the same $4,000 as before?
A. We copied the serial numbers down of the $4,000 and the money that we took off of Mr. Vasquez is the same serial numbers that we had given him in the truck.
Q. Now in terms of the Taurus, did you run the Taurus's license plate?
A. Yes, sir.
Q. Who did it come back to?
A. Marilyn Vasquez.
Q. Did law enforcement agents attempt to contact Marilyn Vasquez?
A. Yes.

Q. How did they do that?
A. By using a cellphone number or a home phone number that Alexander Vasquez had provided to us.
Q. And were law enforcement agents able to contact her?
A. No.
Q. Did you at some point learn whether there was a connection between Marilyn Vasquez and Alexander Vasquez?
A. Yes.
Q. And what was that connection?
A. That they were married.
Q. Were you involved at some point in searching the green Ford Taurus?
A. Yes, sir.
Q. And when was this?
A. The following day.
Q. Did you observe anything unusual about the car when you began your search?
A. Yes, sir, I did.
Q. What did you observe?
A. My partner and I started to search the car and saw that there was speaker-type wires, after-market speaker wires that were running along the floorboards, and there was also a strong odor of cocaine in the car.
Q. And how do you recognize this odor?
A. From all the other times that I actually smelled cocaine

on different cases that we have worked.

Q. Now before I continue with that, let me -- did you find anything else of interest in the car when you did your search?

A. We found a piece of paper with an address in Chicago on Montclaire.

Q. Now, after police arrested Alexander Vasquez, did he provide an address for where he lived?

A. Yes, he did.

Q. Did you at some point determine where Alexander Vasquez lived?

A. Yes, sir.

Q. How did you do that?

A. Cook County HITA subpoenaed some phone records for us that Alexander -- Cook County HITA. I'm sorry. A Cook County drug group that we work with -- was able to subpoena phone records from the number that Alexander Vasquez had provided and was -- it was able to establish an address of where they had received bills.

Q. And did you go to that address?

A. Yes.

Q. And did you -- were you able to confirm that this was the address of Alexander Vasquez?

A. Yes, we did.

Q. And did you confirm whether anyone else lived there?

A. Yes.

Q. And who else lived there?
A. Joel Perez and Marilyn Vasquez.
Q. Did this address match any of the addresses that you were previously talking about?
A. Yes.
Q. Which address?
A. It was same one as the piece of paper that we found inside the Taurus.
Q. Did it match the address that Alexander Vasquez had provided after he was arrested?
A. No.
Q. Turning back to the Taurus, you mentioned some wires and an odor, what did you do then?
A. We followed the wires, where the wire trail actually led. It led up to the passenger side, near the airbag on the passenger side front of the car.
Q. And based on your training and experience, what did you -- what did you do then?
A. I inspected the underside of the dashboard and I saw that there was some welded after-market steel and some gray duct tape that had actually started coming off of the backside of this welded steel that was up underneath the dash.
Q. So what did you do then?
A. Well, from past cases we know that there is traps utilized in cars, hidden compartments. We trailed the wires

back down and ended up jumping the wires with the battery power.

Q. What happened after that?

A. A latch on the dashboard passenger side that would normally have contained the airbag popped open.

Q. And then what did you do?

A. We opened the top of the air bag and inside was the metal box lined with felt, and there was another four and a half ounces of cocaine and approximately $15,000 cash.

Q. You mentioned some cocaine.

How was that packaged?

A. The same way that he had given the informant, it was in a plastic bag, four and a half ounces weighed out.

Q. And you mentioned some money.

How was that money arranged?

A. It was bundled with rubber bands. Like I said, it was between 15 and $16,000 cash.

MR. LEE: May I have a moment, your Honor?

THE COURT: Yes.

MR. LEE: Nothing further at this time, your Honor.

THE COURT: All right.

Members of the jury, you have just heard evidence of acts of the defendant other than those charged in the indictment. You may consider this evidence only on the question of the defendant's knowledge, intent, absence of

mistake or accident, identity and modus operandi. You should consider this evidence only for this limited purpose. You will be instructed again on this issue at the conclusion of the case.

You may inquire, counsel.

MR. BRINDLEY: Thank you, your Honor.

MR. LEE: We have a stipulation to read --

THE COURT: You may read it.

MR. LEE: -- just following Mr. Raysby's testimony before his cross examination.

THE COURT: Proceed.

MR. LEE: The United States of America, through Assistant United States Attorneys Steven Chahn Lee and Kruti Trivedi, and Defendant Alexander Vasquez, Jr., individually and through his attorney Beau Brindley, hereby agree and stipulate that the following facts are true:

On April 22nd, 2002, Alexander Vasquez, Jr., was charged in the Circuit Court for DuPage County with unlawful delivery of a controlled substance, a violation of 720 Illinois Consolidated Statute 570/401-A2-B.

On May 19th, 2004, in the Circuit Court for DuPage County, Alexander Vasquez, Jr. pled guilty to and was convicted of the charge.

MR. BRINDLEY: May I proceed now, your Honor?

THE COURT: Yes.

MR. BRINDLEY: Thank you.

CROSS EXAMINATION

BY MR. BRINDLEY:

Q. Is it Detective Raysby, sir?

A. Yes, sir.

Q. Okay. Detective, in this case where Mr. Vasquez ended up pleading guilty that you have been talking about, it's correct to say that when he participated in this drug transaction Mr. Vasquez had telephone contact with the informant that was going to do the transaction, didn't he?

A. Yes, sir, he did.

Q. Personally he had direct contact, right?

A. Yes, sir.

Q. Multiple calls, right?

A. I believe there was three or four that he was a part of, yes.

Q. Okay. And on the day that the transaction was supposed to happen when he actually was participating, Mr. Vasquez went to the place where the transaction was going to happen, right?

A. That's correct.

Q. And he didn't just go there, Mr. Vasquez actually got out of the car and met with the person he was doing the transaction with, didn't he?

A. Yes, sir.

Q. And when he was actually participating, it was

Mr. Vasquez who provided cocaine to the other person, correct?
A. That's correct.
Q. And Mr. Vasquez that took the money from the person, correct?
A. Yes, sir.
Q. And when this transaction happened in 2002, Mr. Vasquez and Mr. Perez were present together in this one vehicle, right?
A. That's correct.
Q. So it's fair to say that when he was actually participating in the drug deal you investigated, Mr. Vasquez certainly was not sitting quietly in a car parked some distance away, was he?
A. No, sir.
Q. Detective, you mentioned the -- that an investigation was done with respect to this car that was I think registered to a Marilyn Vasquez, is that correct?
A. Yes, sir.
Q. And you indicated that Mr. Vasquez was married to this individual?
A. That's the information I had been given, yes, sir.
Q. Okay. But you have never actually seen any document showing that he has ever really been married, right?
A. No, sir.
Q. Okay. And, Detective, just so I'm clear about this whole thing, all of this stuff that you've testified about, all these

events, all that happened like seven years ago about, right?
A. That's correct.
Q. You did not play any role in the investigation of what happened on August the 5th of 2008, did you?
A. No, sir.
Q. So you don't have any idea what Alexander Vasquez did -- let me rephrase the question.
You didn't observe anything of what Mr. Alexander Vasquez did or didn't do on August 5th, 2008, did you?
A. That's correct. I do not know anything about that.
Q. And so since you didn't have any observations or play any part, you also can't tell us anything about what Alexander Vasquez did or didn't know about what was going on on August 5th, 2008, can you?
A. No, sir.
Q. In that case, Detective, I don't have any other questions.
MR. LEE: Nothing further, your Honor.
THE COURT: You are excused.
THE WITNESS: Thank you, your Honor.
(Witness excused.)
THE COURT: Do you have another witness ready to go, counsel? If you do, bring in the next witness.
MR. LEE: If we could have one moment, your Honor.
THE COURT: All right.

MR. LEE: We have one exhibit to introduce. This is a certified record, public record.

THE COURT: All right. Proceed.

MR. LEE: Your Honor, we move for admission of Government Exhibit Title 2, a certified public record regarding the title of the Pontiac Bonneville in this case.

THE COURT: The public record is received, made part of the record, and may be published to the jury.

MR. LEE: Thank you.

Publish to the jury?

THE COURT: Yes.

MR. LEE: I'm publishing Government Exhibit Title 2, title to a 1993 Pontiac Bonneville with a registered owner Myra Vasquez, 7554 West Forest Preserve, Chicago, Illinois, 60634.

The government now calls Detective Nathan Hayes.

THE COURT: Please raise your right hand.

(Witness sworn.)

THE COURT: Please be seated.

THE WITNESS: Thank you.

NATHAN HAYES, PLAINTIFF'S WITNESS, SWORN

DIRECT EXAMINATION

BY MR. LEE:

Q. Could you please state your name for the record.

A. Nathan Hayes, H-A-Y-E-S.

Q. And are you currently employed?

A. I am.
Q. Where are you employed?
A. I work for the Arlington Heights Police Department.
Q. And what is your title with the Arlington Heights Police Department?
A. I'm a detective.
Q. And how long have you been with the Arlington Heights Police Department?
A. Almost 11 years.
Q. And how long have you been a detective?
A. Approaching eight and a half years.
Q. In your time as a law enforcement officer, have you received any kind of specialized training?
A. I have.
Q. Briefly, what kind of training have you received?
A. Numerous hours of training from everything from basic crash investigation up to complex homicide investigation, including numerous courses in narcotics investigations.
Q. Detective Hayes, were you involved in an investigation involving Alexander Vasquez?
A. I was.
Q. And now turning your attention to August 5th, 2008, were you working that day --
A. I was.
Q. -- in connection with that investigation?

A. Yes, sir, I was.
Q. Now turning your attention to later in the day at approximately 5:30, where were you?
A. I was parked in a vehicle at the Ashton apartment complex in Arlington Heights.
Q. Why were you at the Ashton apartment complex?
A. In assisting the DEA with this investigation, I was part of an arrest team that was parked in the complex, and we were to arrest the potential buyers when they showed up at that complex.
Q. And I think you mentioned that you were parked. Were you in a vehicle?
A. Yes, I was in a vehicle with DEA Agent Keith Landau.
Q. And what was your understanding at this point as to the plan of the operation?
A. At that point the plan was that the potential buyers were going to be led to the parking lot where we were waiting, and then when they were parked, we were going to then effect the arrest, get out of our vehicle and make the arrest.
Q. Now, were you keeping contact with other law enforcement officers that day?
A. Yes, we were.
Q. How were you doing that?
A. Via the handheld radios and through cellular telephones.
Q. At some point while you were at the Ashton apartment

complex, did you receive any information of interest?
A. Yes, we did.
Q. What was that information?
A. The information was that the arrest plan had changed and the arrest was now going to take place at the Denny's parking lot in the area of Arlington Heights Road and Algonquin Road.
Q. Did you receive any information about how this changed -- about whether this would affect what you were going to do?
A. Yeah, we were directed --
MR. BRINDLEY: Objection, your Honor. Foundation as to source.
THE COURT: Overruled.
You may respond.
BY THE WITNESS:
A. We were instructed to respond to that area and assist with the arrest as they were coordinating the units to try to get to the area at the same time and effect the arrest.
BY MR. LEE:
Q. And were you going to come into the area from a specific direction?
A. Yeah. We were to come into the Denny's parking lot through the south side and come along the east drive, northbound on the east drive.
Q. And were there going to be other agents involved?

A. Yes, there were. There was --
Q. And what were you going to be looking for when you got to that area?
A. We were told they were looking for a black Pontiac Bonneville four-door, a silver Nitro, and possibly three suspects or offenders that we would be looking for.
Q. Did you receive any information about these suspects?
A. We were told that they were male Hispanics and we were given the vehicle descriptions that we would be looking for when we arrived.
Q. What did you do then?
A. At the appropriate time to try to coordinate, we entered the driveway, like I say, driving northbound, approaching -- turning into the parking lot, and observed the black four-door Bonneville parked in the parking lot facing eastbound in the spot -- in a parking spot.
Q. Now about how much time passed between when you received information that potential buyers were not going to come to the and Ashton apartment complex and the time you arrived at the parking lot?
A. Probably five minutes or so, maybe a little bit less. It's not that far of a drive, and to coordinate everybody's arrival, it's probably a little under five minutes maybe.
Q. What kind of car were you in at this point?
A. I was in a -- I believe it was a Chevy Trailblazer. It

was a sport utility vehicle.
Q. Was this a marked car somehow?
A. No, it was an unmarked vehicle.
Q. Was the SUV equipped with any kind of lights or sirens?
A. It was equipped with both lights and sirens.
Q. Were those lights and sirens operating at that time?
A. Yes, they were activated as we entered the lot and approached from the south.
Q. So what did you notice, what did you observe when you arrived in the Denny's parking lot?
A. As we pulled up towards the Bonneville, I noticed that DEA agents and other Arlington Heights police officers were coming on foot through the gas station as part of the coordinated approach. And as they were running, I saw the black Bonneville start to back out of its spot.
Q. Did you observe anything about -- you mentioned some DEA agents on foot.

Did you observe anything about those DEA agents at this time?
A. Yeah. They were all wearing ballistic vests that were marked with "police." They had police markings on them.
Q. And did you observe any of those agents do anything in particular of interest?
A. Yes. As the vehicle started to back up, I believe there was a group supervisor, Kirk Seeley, tripped as he tried to

step over a small kind of wire barrier and fell headlong into the vehicle, striking the bumper as it backed up with his head, jarring his head back pretty violently. It was a strong collision with his head hitting the front of the car.

Q. Just to be clear, General Supervisor Seeley, did he later recover from any injuries that he may have suffered in the fall?

A. Yeah, he did recover.

Q. So what did you observe next?

A. The vehicle canted in its backing back towards us, which would be backing southbound along the drive. And then I was looking at Agent Seeley, I thought he was injured pretty seriously, so as I was watching him, I ascertained that he was going to be okay. There were other officers and other people rendering him aid. Then I looked back up and looked at the black Bonneville.

Q. And what did you observe about the Bonneville at this point?

A. The Bonneville was now facing northbound and driving northbound trying to get out of the Denny's parking lot on to Algonquin Road.

Q. And did you observe anything about -- what did you observe next?

A. There were other police vehicles, specifically two unmarked Arlington Heights police cars, and the black

Bonneville, it looked like he intentionally rammed them to push them out of the way because they were blocking his access to get out on to Algonquin Road.

Q. Did you observe anything in particular, anything about -- you mentioned those cars were unmarked?

A. Um-hum.

Q. Were those cars operating any kinds of lights or sirens?

A. Yes, they had their lights on. The sirens, I don't know because our sirens were going off. I can't say definitively their sirens were on because there were lots of sirens going on there. There were sirens activated all over. But their lights were on.

Q. Now in terms of this black Bonneville, did you observe anything about any individuals that were inside the car?

A. I was behind it. I just observed two people. Looked like it was occupied by two people.

Q. Now, while that was going on, what were you doing?

A. Initially right as soon as we pulled up, I opened my doors, I was going to jump out to assist in the arrest, but as soon as the vehicle started backing up, I kind of pulled my leg back in and closed the door. As they were driving through onto Algonquin, I was putting my seat belt back on and trying to keep my eyes on where they were going.

Q. So what did you do next?

A. The black Bonneville made it onto Algonquin Road and

turned left, which would be westbound, but into the eastbound lanes because there's a median, you can't get into westbound Algonquin, and took off at a high rate of speed westbound in the eastbound lanes of Algonquin Road.

Q. What did you do then?

A. We drove out of the parking lot and tried to follow to catch up to see where they were going.

Q. As you went -- as you went along Algonquin Road yourself, did you observe anything of interest?

A. Yeah. We -- as soon as we could, we switched over into our proper lanes in the westbound lanes and continued trying to catch up. When we got to Meyer Road, which is just before Golf Road, observed a motorcyclist, he looked like he had been in an accident. He was crumpled over his motorcycle and looked like he was injured in some capacity.

Q. Now I think you mentioned earlier that you were in contact via radio and cellphones with other law enforcement agents.

Were you still in contact with other law enforcement agents at this point?

A. Yes, we were.

Q. Did you receive any information -- did you hear anything of interest at this point?

MR. BRINDLEY: Objection. Hearsay.

THE COURT: Overruled.

You may answer.
BY THE WITNESS:
A. When we got up to the area of where the motorcycle was, I heard Detective Basinsky of the Arlington Heights Police Department say that he was going to check -- he stated that he was going to search westbound on Golf Road for the vehicle and we said that we would continue on Algonquin and look for the vehicle going northwest on Algonquin Road.
BY MR. LEE:
Q. Did you receive any information about this motorcyclist you mentioned?
A. Yes, we did. There was other officers that stopped and rendered aid and called for an ambulance and tried to secure that scene as we continued on.
Q. And just to be clear, did that motorcyclist recover from any injuries that person may have suffered?
A. Yeah, I believe he did.
Q. So I believe you referred to information that you received from the other detective.
Did you hear anything else of interest over the radio?
A. Yeah. As we continued on Algonquin I heard Detective Basinsky get onto the radio again and state that he had spoken with a Pace bus driver who said that --
MR. BRINDLEY: Objection, hearsay.

THE COURT: Is this offered for the truth of the assertion or the effect on the mind of the hearer and subsequent conduct?

MR. LEE: It's for the effect of subsequent conduct and state of mind.

THE COURT: All right. For that limited purpose, you may proceed.

BY THE WITNESS:

A. He stated on the radio that the bus driver said that the vehicle we were looking for may have crossed offroad and went into the Walmart parking lot.

BY MR. LEE:

Q. What did you do then?

A. We continued along Algonquin and entered the Walmart parking lot from the north driveway and turned in to look for the vehicle.

Q. Did you see anything as you entered the Walmart parking lot from the north?

A. We did. As soon as we got to the parking lot, we observed a black four-door Pontiac Bonneville which appeared to be the same vehicle parked in a space on the north side of the Walmart building.

Q. Did you confirm that this was the car you were looking for?

A. Yeah. Somebody ran the license plate over the radio and

we got confirmation that this was in fact the vehicle we were looking for.

Q. Did you then approach the vehicle?

A. We did. We exited our vehicle and approached the vehicle to ascertain if it was occupied still.

Q. And were you able to do so?

A. We were, and the vehicle was unoccupied.

Q. Did you observe anything about the physical condition of the car?

A. It appeared that there was some damage to the vehicle.

Q. Do you recall anything about the damage?

A. Not any specifics. I just recall that there was some damage to the vehicle.

Q. And just to be clear, was there anyone inside the car at this point?

A. No, sir, the vehicle was unoccupied.

MR. LEE: May I approach, your Honor?

THE COURT: Yes.

BY MR. LEE:

Q. Detective Hayes, I'm handing you what's been previously marked as Government Exhibit Aerial Photo.

Do you recognize this?

A. I do.

Q. What is it?

A. It appears to be an aerial photograph of the south side

of Arlington Heights Road -- of Arlington Heights, Illinois.
Q. And does this photo truly and accurately depict that area as you know?
A. Yes, it does.
MR. LEE: Your Honor, the government would move for admission of Government Exhibit Aerial Photo.
THE COURT: It is received.
(Government Exhibit Aerial Photo received in evidence.)
MR. LEE: And may I publish to the jury?
THE COURT: Yes.
MR. LEE: I'm handing the witness a laser pointer.
THE COURT: Yes.
MR. LEE: To assist in demonstrative.
BY MR. LEE:
Q. All right. Detective Hayes, I'm placing on the screen in front you Government Exhibit Aerial Photo.
A. Okay.
Q. Could you just help the jury get situated. Looking at the bottom, kind of bottom left of the screen, there is -- appears to be a large diagonal road.
Can you use the laser point to identify that for the jury? Can you tell the jury what that is?
A. Yeah, which button does --
Q. That's the red button on the laser pointer.
A. This would be I-90 (indicating).

Q. Can you identify for the jury where the Ashton apartment complex is that you mentioned earlier?
A. Algonquin Road is right here and the Ashton apartment complex sits right in here (indicating).
Q. And you mentioned Algonquin Road.
Can you use the laser pointer to just track along Algonquin Road.
A. (Witness complies.)
Q. Can you identify for the jury Arlington Heights Road?
A. It's the north-south street.
Q. Now, you mentioned the Shell gas station and Denny's parking lot.
Can you identify for the jury where that is.
A. Those are right here (indicating).
Q. Now, you also mentioned Meyer Drive where you saw a motorcyclist.
Can you identify that location?
A. Right here (indicating).
Q. Can you also identify the Walmart parking lot you were just talking about.
A. The Walmart sits right here, and the right, towards the north side right about here, is where the car was (indicating).
Q. Now, about how far in distance is that Walmart parking lot from the Denny's and the Shell gas station?
A. Half a mile to a mile, give or take. Probably half a

mile.

Q. Thank you.

MR. LEE: May I approach, your Honor?

THE COURT: Yes.

BY MR. LEE:

Q. I'm now handing you what's been previously marked as Government Exhibit Rolling Meadows Photo.

Do you recognize this?

A. I do.

Q. What is it?

A. It appears to be an aerial photo. On the bottom right corner looks like the top edge of the Walmart; top left corner looks like the intersection of Algonquin Road and New Wilke Road.

MR. LEE: Your Honor, the government moves for the admission of Government Exhibit Rolling Meadows Photo.

THE COURT: It is received and may be published.

MR. LEE: We also have a demonstrative blown-up version of this photo.

THE COURT: It may be used.

(Government Exhibit Rolling Meadows Photo received in evidence.)

MR. LEE: I'm placing it on the screen, Rolling Meadows Photo, and also put up a blowup, blown-up image of that demonstrative.

Your Honor, may the detective get off the witness box so he can actually point out things on the demonstrative?

THE COURT: Yes, you may step down.

THE WITNESS: Thank you.

BY MR. LEE:

Q. All right. Detective Hayes, now you've seen a larger overview and now this closer view.

Can you identify for the jury where you saw the black Pontiac Bonneville?

A. The black Bonneville was parked in the parking lot here on the north side of the Walmart, which is right here (indicating).

Q. Then what did you do after inspecting the car?

A. After we deemed that it was unoccupied, we kind of fanned out to try to look for the two subjects. I kind of trotted over this way into LeMeridia, which is a banquet hall, which is right here, and we ran into a homeless subject right here (indicating).

Q. And did you ask the homeless subject anything?

A. I did. I asked him if he saw two people run by from the vehicle right back there. He stated that he did see two people run by and he pointed behind him and stated they ran toward the McDonald's which is over here (indicating).

Q. So then what did you do?

A. Agent Landau and I ran this way, with Agent Landau

running along the drive here to the south of the McDonald's, and I cut across the parking lot, which would be the Oberweiss and the old Baker's Square, directly towards McDonald's (indicating).

Q. Did you at some point enter the McDonald's parking lot?

A. I did.

Q. As you entered the McDonald's parking lot, did you observe anything of interest about the McDonald's?

A. I did. As I was making my way into the parking lot, I had my eyes on the windows of the McDonald's. And when I was looking at the window, I saw a male Hispanic subject looking at me, appeared to be very interested in what I was doing, eyes were big, and appeared to be very interested in what I was doing.

MR. BRINDLEY: Objection. Speculation, your Honor.

THE COURT: That's overruled. 701.

BY MR. LEE:

Q. What did you do at this point?

A. I continued to keep my eyes on the window, picked up my pace slightly and the face I saw in the window ducked down and was no longer in the window.

Q. Just to back up a second, what were you wearing at this point?

A. Blue jeans, t-shirt and my ballistics vest, which was marked with a police emblem, and my full -- my duty belt, my

gun, handcuffs, all of the accoutrements that I wear.
Q. What did you observe next?
A. Like I say, the head went down behind the window or out of view. I picked up my pace slightly, continued going to the window. Then the same face appeared again, locked eyes with me, now very interested in what I was doing. I found it suspicious. I started to actually trot towards the McDonald's, then the person then turned, looked like they ran through the McDonald's or ran away from the window.
MR. LEE: May I approach the witness, your Honor?
THE COURT: Yes.
BY MR. LEE:
Q. I'm showing you what has previously been marked as Government Exhibit McDonald's Photo.
A. Okay.
Q. Do you recognize this?
A. I do.
Q. What is it?
A. It appears to be a photograph of the McDonald's that I spoke of on Algonquin Road.
Q. And does that photograph truly and accurately depict the McDonald's that you remember from that day?
A. Yes, it does.
MR. LEE: The government moves for admission of Government Exhibit McDonald's Photo.

THE COURT: It is received and may be published.

MR. LEE: Thank you, your Honor.

(Government Exhibit McDonald's received in evidence.)

BY MR. LEE:

Q. Detective Hayes, I'm putting Government Exhibit McDonald's Photo on the screen for you.

You mentioned earlier seeing a head pop up and down in a window. Can you identify, using that laser pointer, what you were referring to, which window you were referring to?

A. This window here (indicating).

Q. It's the window about -- not necessarily the front of the building, but a little one back.

A. Yeah. This is the entrance right here, you can hardly make it out, and this is the window right here (indicating).

Q. So then after you saw this, after you saw this head go up and down, what did you do?

A. I then ran to the McDonald's and walked into the doors that are right here (indicating). When I got inside, I was met by the manager. He was very disturbed. He just yelled to me, they ran out the back door, they ran through the kitchen and out the back door.

I called out on my radio that the suspects had fled through the McDonald's out the south door, service door. Acquired a clothing description from the manager, which he told me white t-shirt, black pants. I put that information out as

well on the radio.

THE COURT: Do you need the map any further, counsel?

MR. LEE: Actually, yes.

THE COURT: Well, would you raise your voice. The court reporter can't quite pick it up.

MR. LEE: I apologize.

BY MR. LEE:

Q. So what did you do next?

A. I ran through the kitchen and out the back door that the manager told me that the two suspects had fled from and ran southbound across the parking lot.

Q. So can you use the demonstrative and show which way you went.

A. Yeah, the back door sits right here. I ran straight out this way (indicating).

Q. And just pointed towards what appears to be a building, what is that?

A. This building here would be the Hickory Wilshire restaurant, and this is where he ran towards, that way (indicating).

Q. And did you observe anything of interest when you ran that way?

A. I did. When I came around the corner of the Hickory Wilshire, I saw that Officer Sefton had a male Hispanic in custody, that he was handcuffed and bent over the vehicle.

Q. What did you do then?
A. I ran up and asked Officer Sefton if he needed any assistance. He said no, he had everything under control there. Then I turned and saw that Officer Sullivan had another suspect in custody over here in front of the Fifth Third Bank, which is right here (indicating). Then I ran over there to see if he needed any assistance.
Q. What did you find out when you got there?
A. When I got there, he had the suspect in custody and said he didn't need any assistance. He turned over two cellular telephones to me. He said he had found them in the area where the suspect was arrested was, and he gave them to me.
MR. LEE: I think you can sit down. I don't think we will need to use the demonstrative anymore with you.
May I approach, your Honor?
THE COURT: Yes.
BY MR. LEE:
Q. Detective Hayes, I'm showing you what is previously admitted as Perez Phone 8098 and Perez Phone 0452.
Looking at these exhibits, do you recognize them?
A. I do.
Q. What are they?
A. These are the two phones that were given to me by Officer Sullivan when I met him outside the bank.
Q. Thank you.

Detective Hayes, you mentioned that two individuals were taken into custody. Did you have an opportunity to observe these two individuals?

A. I did.

Q. And did you recognize either of the individuals when you saw them?

A. Yes, I did.

Q. And did you also know these individuals' names?

A. I did.

Q. And what were their names?

A. I recall one of the names, the name was Anthony Vasquez.

Q. And the other name?

A. It escapes me at this moment, sir.

Q. Did you recognize either of these individuals that were taken into custody?

A. I did.

Q. And how did you do so?

A. I recognized Mr. Vasquez as the same subject that I saw in the window at the McDonald's.

Q. Looking around the courtroom, do you see that individual, Mr. Vasquez, here today?

A. I do.

Q. And can you identify him by something he is wearing.

A. Seated at the table to your left, dark suit with glasses.

MR. LEE: Your Honor, may the record reflect that the

witness has identified the defendant?

THE COURT: Yes. So ordered.

BY MR. LEE:

Q. And, Detective Hayes, regarding the phones that Officer Sullivan gave you, what did you do with those?

A. When -- I placed into my front vest pocket and they stayed there until I returned to the police station and turned them over to Task Force Officer Sperando.

MR. LEE: If I may have one moment, your Honor?

THE COURT: Yes.

MR. LEE: Nothing further at this time, your Honor.

THE COURT: Members of the jury, we will take a short break, after which you will hear cross examination.

You may step down for a few minutes, Officer.

THE WITNESS: Thank you.

(Recess.)

THE COURT: You may cross examine.

MR. BRINDLEY: Thank you, your Honor.

CROSS EXAMINATION

BY MR. BRINDLEY:

Q. Detective, you began your testimony talking about when you went into the Denny's parking lot to participate in the arrest pursuant to the new arrest plan, right?

A. Yes, sir.

Q. Okay. And you said when you got there one of the -- got

to the Denny's parking lot, one of the things you saw was you saw a supervisor, Mr. Seeley, he tripped over something on the ground, correct?

A. Yes, sir.

Q. Okay. And then you saw him fall and he hit his head on the hood of the vehicle that Mr. Vasquez was in, correct?

A. It appeared that it was a bumper, not the hood. It looked like it was behind the front bumper he hit.

Q. And at that time Mr. Vasquez's car was still parked there, right?

A. No, it was backing up.

Q. So what you saw was you saw the car start to back up before he hit his head, right?

A. The car was in motion when he hit his head.

Q. All right. And then you said what you saw -- after that you looked to see if he was okay, the supervisor --

A. Yes.

Q. -- right?

And then you looked back at the Bonneville, correct?

A. Yes, sir, I went back.

Q. And saw the Bonneville had backed up, correct?

A. Yes, sir.

Q. It changed directions, correct?

A. It had backed towards me.

Q. It backed towards you?

A. It was now facing away from me.
Q. It backed towards you and changed directions, correct?
A. Yes.
Q. And then put it into drive and went forward, correct?
A. Yes.
Q. And it was when it went forward that it struck these vehicles, right?
A. It was -- it was very chaotic. Everything happened at once. It don't remember the order of it. I remember the vehicle pushing the Arlington Heights cars of the way to get out of the way.
Q. You actually saw the Bonneville push the Arlington Heights police cars out of the way and move them?
A. Yes.
Q. And the car was going forward and pushing them out of the way, that's what you saw, correct?
A. Yes.
Q. Now, after that you left to follow and pursue the Bonneville, correct?
A. We left to try to catch up to the Bonneville.
Q. And you said that you saw this motorcycle, there was a motorcycle that appeared that had been involved in some kind of accident, correct?
A. Yes.
Q. But you didn't actually see the accident, correct?

A. No, just saw the motorcycle and the --
Q. Now, after that you proceeded -- where did you go after you saw the motorcycle?
A. We stayed on Algonquin Road and continued northbound on Algonquin.
Q. And at some point in time -- was it a Walmart or a McDonald's, which did you go to?
A. Initially we went into the driveway through the Walmart.
Q. And you didn't see anybody in the Walmart, correct?
A. I'm sorry, that's wrong.
Q. Didn't see Mr. Vasquez in the Walmart parking lot?
A. No, I didn't see him in the Walmart parking lot.
Q. You didn't observe him running from the Walmart parking lot, did you?
A. No.
Q. And then you said you proceeded to this McDonald's, correct?
A. Yes, sir.
Q. And at some point in there you talked to a homeless person, right?
A. This was prior to McDonald's. This was in the LeMeridia parking lot, which is right next to the McDonald's, and he is the one who directed me towards McDonald's.
Q. So a homeless person directed you towards McDonald's, right?

A. Yes.
Q. But you didn't actually observe him running towards McDonald's?
A. No, I did not.
Q. You said you went over to the McDonald's?
A. Um-hum.
Q. And you saw him in the window?
A. Yes.
Q. And then subsequent to -- but you did not -- were you at some distance away when you saw him in the window?
A. Yes.
Q. And there were no officers inside the McDonald's at that time?
A. No.
Q. Were there other officers with you proceeding to the McDonald's at that time?
A. No, I was by myself. Agents, as I had pointed out on the map, had proceeded on the road.
Q. You preceded any backup when you saw him?
A. I did not know who he was when I saw him.
Q. When you saw him, you couldn't tell who he was, right?
A. No.
Q. And his actions didn't give you enough information to even call for backup to seal the McDonald's, correct?
A. Not initially.

Q. And eventually he was arrested outside the McDonald's, wasn't he?
A. I believe he was arrested in the parking lot of the Hickory Roasters.
Q. Near the McDonald's or adjacent to the McDonald's?
A. Yes, one restaurant south.
Q. Were you present when he was arrested?
A. No, I was not.
Q. Now, Detective, you have given a lot of testimony here about what happened after this drug transaction was over, correct?
A. Yes.
Q. But when the transaction was going on, sir -- or before it was going on, at any of that time you never ever heard any recording in which Alexander Vasquez said anything about knowing what was happening there, did you?
A. No.
Q. And you have no way to know whether Joel Perez told Alexander Vasquez -- let me rephrase that question.

You never observed what Joel Perez told Alexander Vasquez before asking him to come pick him up in Arlington Heights, did you?
A. No, I did not.

MR. BRINDLEY: Nothing else, your Honor.

MR. LEE: Just a few quick questions, your Honor.

THE COURT: Proceed.

REDIRECT EXAMINATION

BY MR. LEE:

Q. Detective Hayes, after you observed Mr. Vasquez in the McDonald's window, why didn't you call for any backup at that time?

A. At that point it was just a somewhat suspicious face in the window and I was walking towards McDonald's to investigate further.

Q. At this time what is your understanding what other law enforcement were doing at this time?

A. They were all assigned to search the area for the two others.

Q. Did it make sense to call for help and seal the McDonald's as you were approaching McDonald's?

A. No, because not knowing who I was looking for, it wouldn't have made sense to come and lock down the McDonald's just because I saw a suspicious face in the window.

Q. At some point as you were in the McDonald's, you did walk past the suspicious face in the window?

A. Yes, I did.

Q. And what changed your mind?

A. Face disappeared, looked right up, looked right at me. Kind of rapidly ran away. When I picked up my pace and ran into the McDonald's, I saw the manager. She was very disturbed

and said: "They ran out the door." She was very disturbed and ran out the back.

MR. BRINDLEY: Objection, your Honor.

THE COURT: Is this for the truth of the assertion?

MR. LEE: No. For the assertion.

THE COURT: Proceed.

MR. LEE: May I have a moment?

(Pause.)

MR. LEE: Nothing further, your Honor.

THE COURT: All right.

You may step down, Officer.

THE WITNESS: Thank you.

THE COURT: Please call the next witness.

MR. LEE: The government calls Officer Kenneth Sullivan.

THE COURT: Please raise your right hand.

(Witness sworn.)

THE COURT: Please be seated.

KEVIN SULLIVAN, PLAINTIFF'S WITNESS, SWORN

DIRECT EXAMINATION

BY MR. LEE:

Q. Good morning, Officer Sullivan.

A. Good morning.

Q. Can you please state your name for the record.

A. Officer Kevin Sullivan.

Q. And are you currently employed?
A. Yes.
Q. Where are you employed?
A. The Village of Arlington Heights.
Q. And are you employed in a particular agency of the Village of Arlington Heights?
A. Yes. I'm on the patrol unit for the Arlington Heights Police Department.
Q. And how long have you been with the Arlington Heights Police Department?
A. Eight and a half years.
Q. What are your duties as a patrol officer?
A. I handle patrol as well as I'm a K-9 handler. So I also handle the duties of the K-9 officer.
Q. Turning your attention to August 5th, 2008, were you working that day?
A. Yes, I was.
Q. And were you working for the Arlington Heights Police Department?
A. Yes, I was.
Q. At some point that day did you receive information of interest?
A. Yes.
Q. What was that information?
A. That day a call came up over the radio regarding a

pursuit that was on the south side of town.
Q. South side of Arlington Heights?
A. Arlington Heights, that's correct.
Q. And where were you at that point?
A. At that time I was at the police station in my squad car, marked squad car.
Q. And based on that, did you do anything?
A. Yes. I began to go down towards the location of the -- where the pursuit was, heading towards in the direction of travel.
Q. And what general location were you headed towards?
A. I was heading towards the southwest section of our town. The pursuit was going westbound on Algonquin Road, heading towards our western border.
Q. Now, as you were heading in that direction, were you in contact with other law enforcement agents?
A. Yes, there were other radios. We had other officers communicating on the radio about their whereabouts and their location and what the pursuit was going towards.
Q. And based on that information -- strike that.
Did you receive additional information with regards to this pursuit?
A. Yes. That the vehicle was fleeing from the officers that had pulled into a parking lot and that subjects had fled from the vehicle and were last seen heading to a McDonald's.

Q. And did you receive information about a particular McDonald's?
A. Yes, McDonald's on Algonquin Road near New Wilke Road.
Q. Based on the information, what did you do?
A. I went to the corner of Algonquin and New Wilke and went around the corner of New Wilke, which is right next to the bank parking lot and parked.

At that time an officer in the tactical unit and ground patrol pulled up in his squad car and entered my squad car and we took my K-9.

At that time I saw a subject walking away from the officer near the area of the bushes as well as a garbage containment center.

Q. And so what did you do at this time?
A. At that time I ordered the subject that was walking to stop, and I released my K-9. The subject did stop, and went to the ground, and I called my dog off, and then approached the subject and took him into custody.

MR. LEE: Your Honor, may I publish Government Exhibit Rolling Meadows Photo for the witness to look at?

THE COURT: If you think it's necessary, yes.

MR. LEE: Very briefly, your Honor.

BY MR. LEE:
Q. Officer Sullivan, I'm showing you what's been previously marked as Government Exhibit Rolling Meadows Photo on the

screen in front of you. There is a laser pointer right in front of you, as well.

If you could, just by pressing the red button, could you just point to the location where you saw the suspect you were talking about.

A. Trying to become familiar with what I'm looking at here at the location.

On the screen up here, this is the bank parking lot here. McDonald's is right here. I pulled in, parked my squad car in this location, saw the officer moving this way along the building from underneath. This is a drive-through section. It's open all the way underneath, the roofed drive-through, from the bank.

Right in this section is where I saw the subject walking from the bank towards the parking lot of the McDonald's. At that time when I saw him in this section, I released my dog.

He then complied with my dog and went to the ground immediately. I called off the K-9 and walked out and took him into custody right in the section there. (Indicating.)

Q. After you took the suspect in custody, what did you do?

A. After the subject was taken into custody and turned over to the uniformed officer that can transfer him back to the station, I then checked the area that I last saw the offender walking away from, being the bushes and garbage containment

area, and in doing so I located two cellphones on the ground.

Q. What did you do with these cellphones?

A. The cellphones were then turned over to investigator Nathan Hayes.

Q. And about how far away were these cellphones from where you took the suspect into custody?

A. Within 20 to 25 feet.

Q. And between where were they located?

A. They were located in the bushes along -- next to the garbage center where the person had walked -- the subject had walked away from when I first saw him.

MR. LEE: May I approach the witness briefly?

THE COURT: Yes.

BY MR. LEE:

Q. I'm showing you what's previously admitted as Perez Phone 0452 and Perez Phone 8098.

Can you take a look at these and tell me if you recognize them.

A. Yes. They resemble the phones that I located.

Q. I'll take them back at the present time.

MR. LEE: Nothing further at this time, your Honor.

THE COURT: You may cross.

CROSS EXAMINATION

BY MR. BRINDLEY:

Q. Detective, the individual who you took into custody that

day, you now know that that man was named Joel Perez, correct?
A. As of right now, yes.
Q. When you went to arrest Joel Perez, you didn't find any cellphones on his person, did you?
A. No, I did not.
Q. In fact, you later found them immediately next to the area where you arrested him, correct?
A. I found them within 25 feet from the area that he was walking from, not immediately next to him.
Q. And so based on that, it appeared to you that he had discarded those phones?
A. It appeared that way, yes.
Q. And that was Joel Perez?
A. At the time the person that I apprehended there, I did not know his name.
Q. But as of now you know --
A. That would be correct.
Q. -- the phones would belong to Joel Perez?
A. Right.
Q. Good enough.
MR. BRINDLEY: Nothing else.
MR. LEE: Nothing further.
THE COURT: You may step down. Thank you.
THE WITNESS: Thank you.
(Witness excused.)

MR. LEE: Your Honor, the government calls Officer Chris Sefton.

THE COURT: Please raise your right hand.

(Witness sworn.)

THE COURT: Please be seated.

CHRIS SEFTON, PLAINTIFF'S WITNESS, SWORN

DIRECT EXAMINATION

BY MS. TRIVEDI:

Q. Good morning.

A. Good morning.

Q. Would you please state and spell your name.

A. Yes, Chris Sefton. C-H-R-I-S, S-E-F-T-O-N.

Q. Are you currently employed?

A. Yes, I am.

Q. Where do you work?

A. Arlington Heights.

Q. What do you do in Arlington Heights?

A. Police officer.

Q. How long have you been a police officer?

A. Three years.

Q. During your time as a police officer, have you received any training?

A. Yes, I have.

Q. What sorts of training have you received?

A. Drug detection, drug intervention, surveillance, and all

the basic academy stuff.

Q. Drawing your attention, Officer Sefton, to August 5th, 2008, were you working that day?

A. Yes, ma'am, I was.

Q. What were you doing?

A. I was doing random patrol capacity.

Q. What does it mean to be working in patrol capacity?

A. Answering calls for service, doing patrol.

Q. Were you keeping in contact with other law enforcement officers that day?

A. Yes.

Q. How were you keeping in contact?

A. Over the radio.

Q. Were you on foot or were you in a car?

A. I was in a car.

Q. What did your car look like?

A. It was a marked police squad car, lights, sirens, the whole business.

Q. What were you wearing?

A. Standardized police uniform, the vest, outer carrier vest, duty belt.

Q. Drawing your attention now to the early evening of August 5th, 2008, did you hear anything of interest from the radio to patrol at that time?

A. Yes, I did.

Q. What did you hear?
A. I heard DEA agents over the radio ask for assistance.
Q. Did you hear anything specific?
A. Yes, I did.
Q. What specific things did you hear?
A. From the Denny's parking lot they said they were in pursuit of a black vehicle westbound in the eastbound lanes.
Q. Westbound in the eastbound lanes of which road, did they say?
A. Algonquin Road.
Q. What did you do in response?
A. I was -- I activated my emergency lights and siren and followed that direction -- in that direction.
Q. Where were you when you got the dispatch?
A. I was about a mile and a half north of where the initial incident occurred at Central and Arlington Heights Road.
Q. And where did you go after you heard the dispatch?
A. Headed south on Arlington Heights Road and then west on Golf Road.
Q. Did you hear any other dispatches of interest?
A. Yes, I did.
Q. When?
A. As soon as I got to the intersection of Algonquin Road and Golf Road, the intersection. The offenders were past that and they were heading westbound on Algonquin Road.

Q. When you say the offenders were past Algonquin Road, what do you mean?
A. The offenders were in the vehicle.
Q. Did you hear anything about where the vehicle was located?
A. Yes, I did.
Q. Where was it located according to dispatch?
A. According to dispatch, they advised that they located the vehicle in the parking lot of Walmart unoccupied.
Q. At that time were you provided any description of the people who the DEA was looking for?
A. Yes.
Q. What description were you provided?
A. What I remember is there were two male Hispanics, one male Hispanic wearing a white t-shirt and black jeans.
Q. Did you receive any information about what activity those suspects were believed to be doing?
A. Initially at the start of the day during our roll call shift we were made aware of what was transpiring throughout that day.
Q. So, Agent -- I'm sorry, Officer Sefton, you testified that the car was unoccupied?
A. Yes.
Q. Did you receive any information over the dispatch about the subjects, where they were going to be?

A. Investigative aides broadcast on the radio that a Good Samaritan waved them down and said the two subjects were heading westbound from the parking lot of the Walmart towards the McDonald's.

Q. After that where did you go?

A. I headed westbound on Algonquin Road at Wilke Road, which is just west of the McDonald's.

Q. How far were you from the McDonald's?

A. I would say 50 to 60 yards.

Q. What happened next?

A. Again, an investigative aide broadcast on the radio that he believed the subjects were inside of the McDonald's.

Q. So what did you do after that?

A. I started heading west, or correction, southbound on New Wilke from there.

Q. Were your lights and sirens still on?

A. Yes.

Q. Did you notice anything of interest after that?

A. Yes, I did.

Q. What did you see?

A. I observed two male Hispanics, one matching the description, white t-shirt and black jeans, exit the service door of McDonald's, which is the rear entrance of McDonald's, running southbound.

Q. Who was running southbound, Officer Sefton?

A. The offenders, the two -- possible two offenders that we were looking for.

Q. And did you see where either of them went?

A. Yes, I did.

Q. Where did they go?

A. The subject that I took into custody was wearing a white t-shirt and black jeans, proceeded heading southbound.

The other male Hispanic started heading in a westbound, sort of by some bushes where he ducked down.

Q. Let's focus on the one you observed running southbound.

What did you do when you observed the two subjects? What decision did you make.

A. I believe the offender that I eventually took into custody had a better -- there was a more likelihood of him evading arrest, so I proceeded to go after him.

Q. Where did you go?

A. Through the parking lot of the McDonald's there is a separate business there, it's called Hickory Roasters. Well, there is an elevated parking lot with parking blocks, where I knew just from past experience I wouldn't be able to get over in my patrol vehicle there. So I eventually went around southbound a little bit toward the Hickory Roaster and then intercepted the subject in the parking lot of the Hickory Roasters.

Q. Would you be able to identify that subject if you saw him

today?
A. Yes, I would.
Q. Would you please take a look around the courtroom and see if you see him.
A. It's the male Hispanic wearing the glasses, no tie.
MS. TRIVEDI: Your Honor, if the record would reflect the witness has identified the defendant?
THE COURT: Yes. So ordered.
BY MS. TRIVEDI:
Q. Officer Sefton, did you see the defendant again?
A. Yes, I did.
Q. When?
A. As soon as I rounded the corner of Hickory Roasters I was able to, like I said, intercept or -- I essentially just cut the offender off while he was running.
Q. And can you describe what you did then?
A. I knew there was probably going to be a foot chase, so while I was in the parking lot heading in that direction, I had my squad car door open ready for the foot chase. The offender, when I cut him off with my squad car, he had this really surprised look on his face, almost bug eyes eventually, and when I cut him off, his momentum brought him sort of into my squad car and he placed both his hands on the squad car like this (indicating).
Q. Officer Sefton you said his momemtum led him into your

squad car. Can you explain to the jury what you saw.
A. Yeah, like I said, when I came around the corner he was still running, obviously didn't see me. So when I came around the corner with my squad car, he ran, placing both his hands on the squad just to stop himself from running into the car.
Q. What did he do next?
A. I was exiting my patrol car at that time and in turn he turned around and made a movement as if he was going to run away in the opposite direction from where he was coming from.
Q. Did he have an opportunity to run away?
A. No, he did not.
Q. Why not?
A. Like I said, I was pretty much out of the squad car. He looked pretty tired from running. I had fresh feet. At the same time he was pretty much surrounded by that time.
Q. What did you do then?
A. I ordered the -- I ordered him to the ground and took him into custody.
Q. After that did you search him?
A. Yes, I did.
Q. Did you find anything of interest?
A. Yes.
Q. What did you find?
A. A cellphone.
Q. And where was that?

A. It was in one of his pockets, pants pockets.

MS. TRIVEDI: Your Honor, if I may publish?

THE COURT: Yes.

BY MS. TRIVEDI:

Q. Officer Sefton, I'm publishing what has been admitted into evidence as Government Exhibit Rolling Meadows Photo.

Can you take a moment at look at the area.

A. Yes.

Q. Are you familiar with this area?

A. Yes, I am.

Q. What area is this?

A. This is the -- in the top left corner, that's the intersection of Algonquin Road and New Wilke Road. Algonquin Road is the road that's at the top of the picture and New Wilke is going to be the road that's on the left side of the picture frame.

Q. Officer Sefton, I believe there is some sort of a remote on the stand. If you press the red button, a laser should hopefully pop up.

THE COURT: Are you going to ask the witness to repeat his testimony?

MS. TRIVEDI: No, your Honor. I'm just asking him where he was at key points.

THE COURT: Proceed.

BY MS. TRIVEDI:

Q. Officer Sefton, can you please let the jury know where you were so they are situated when you saw the defendant and the other man run out of McDonald's?
A. Okay. I was heading southbound on New Wilke and I was essentially right here when I observed the defendant and the other subject running out of the McDonald's.
Q. I think you mentioned you kept going --
A. Yes, I did.
Q. -- because there was a median?
Can you just point out where the median would have been?
A. The median is going to be pretty much right here (indicating). You can't get a vehicle through there, a car through there.
Q. Where did you go?
A. Like I said, I headed southbound in this parking lot and around right here (indicating).
Q. And at this point were you ready to get out of your car?
A. Yes.
Q. Why was that?
A. I believed that there was probably going to be a foot chase, so I just wanted to get the best advantage possible.
Q. And at that point was your door open?
A. Yes.
Q. Was that so you could jump out?

A. As I was coming into the parking lot I opened my squad car door, ready to exit my car as soon as possible.
Q. And you mentioned that you saw the defendant there.
Where was it that you saw the defendant?
A. As he rounded this southern -- like my vehicle and him met pretty much right around the corner.
Q. Is that when he braced himself on the vehicle?
A. Yes.
Q. And, Officer Sefton, how much time passed between when you saw the subject run out of the McDonald's and when you saw him stop himself on your car?
A. Five seconds.
MS. TRIVEDI: Nothing further from the government, your Honor.
THE COURT: You may cross examine.

CROSS EXAMINATION

BY MR. BRINDLEY:
Q. Officer, you said you were proceeding -- well, where were you when this whole thing started before you got involved, where were you at?
A. The intersection of Central and -- Central Road and Arlington Heights Road.
Q. And then you received this call that you needed to go where?
A. The call originated from the Denny's parking lot, which

is Arlington Heights Road and Algonquin Road.

Q. And so you got that call and did you start to proceed to the Denny's or did you end up going somewhere else?

A. No, I didn't. They were heading westbound, so I wanted to get ahead of where they could possibly go.

Q. And eventually you ended up -- based on the radio traffic, you ended up near this McDonald's, correct?

A. Yes.

Q. You said you saw both of them running out of the McDonald's, is that right?

A. That's correct.

Q. And then you followed one of them, is that right?

A. Yes, yes.

Q. You saw them leave the McDonald's, and then -- you were still in your car when you started to follow them?

A. Yes.

Q. And you said you pulled your car -- explain to me again what you did with your car.

A. I headed southbound on New Wilke.

Q. Okay.

A. And like I said, there is a raised median so I wouldn't be able to get into the McDonald's.

Q. Okay.

A. So I went around southbound and was able to cut him off as he was cutting through another business.

Q. So you pulled around to cut him off as he was -- and you said he was running, correct?
A. Yes.
Q. All right. But you were able to put your car in park, correct?
A. Yes.
Q. And you said you were getting ready for a foot chase, so you had time to open up your door, correct?
A. Yes.
Q. Were you still in the car?
A. Yes.
Q. But you had time to stop the car and open up the door, right?
A. Yes.
Q. And you had time to do all of that before he even got to the car, right?
A. Yes.
Q. And so -- but you're saying he was running so fast that he couldn't see you and he put his hands on your car, right?
A. There was -- there was -- I pretty much cut him off as he rounded the corner of the business so --
Q. But there was still enough time for you to stop and open the door before he even got to the car, right?
A. My squad car door was open as I was in the parking lot.
Q. You were driving with your door open?

A. Yes.
Q. You opened the door of the squad car in what parking lot?
A. In the parking lot where I took the subject in custody.
Q. So you had the door -- were you holding onto it with your one hand --
A. Yes.
Q. -- or how were you driving with your door open?
A. Just like that.
Q. You had one hand on the door, you had one hand on the wheel, and you are driving the car --
A. Yes.
Q. -- to prepare for a possible foot chase, right?
A. Yes.
Q. And you stopped the car and he is running so fast -- or he doesn't have enough time to stop, and he put his hands on your car, that's what you said?
A. Yes.
Q. Okay. And you said that you had been preparing for a foot chase at that point, right?
A. Yes.
Q. How close was this to the McDonald's?
A. I would say -- from the rear entrance of the McDonald's?
Q. Um-hum. Wherever you saw him leave.
A. I would say 50 yards or so.
Q. 50 yards?

A. Yes.
Q. Okay. And what you said was when he got to your car and put his hands down, you got out because you were concerned about this foot chase, right?
A. Yes.
Q. And you said but then there wasn't a foot chase at all, right?
A. Yes.
Q. And what you said was he looked pretty tired from running and so he gave up, right?
A. Yes.
Q. Okay. You think he really got so tired in 50 yards, is that your testimony?
A. From 50 yards?
Q. You said it was 50 yards. The man had only run 50 yards, right?
A. From what I observed he only ran 50 yards.
Q. The fact of the matter is, sir, there was no foot chase, correct?
A. That I was involved in?
Q. Yes.
You didn't have to chase him after your marked squad car stopped, did you?
A. No.
Q. You got out of your car, correct?

A. Correct.
Q. He did not run from you, did he?
A. No.
Q. He surrendered at that time, didn't he?
A. Yes.
Q. And before he surrendered, this man, Alexander Vasquez, made no attempt to throw away his cellphone that you saw, did he?
A. No.
Q. And apparently during all the time that he was running from the McDonald's he didn't throw it away because he still had it, didn't he?
A. Correct.
MR. BRINDLEY: Thank you, Officer. No further questions.
MS. TRIVEDI: Nothing further from the government, your Honor.
THE COURT: You may step down.
THE WITNESS: Thank you, your Honor.
(Witness excused.)
THE COURT: Do you have another witness out in the hallway there?
MS. TRIVEDI: No, your Honor, we do not.
THE COURT: Can we have a side bar, please?
(Proceedings heard at side bar:)

THE COURT: Do you have any other witnesses set for this afternoon?

MR. LEE: No, your Honor. I think we would be prepared to rest shortly. We could do that after -- now might be a good time for a lunch break and we would probably be ready to rest as soon as we get back.

THE COURT: So there is nobody else left out there?

MR. LEE: No.

MR. BRINDLEY: We are ready to proceed with the defense witnesses this afternoon, your Honor.

THE COURT: All right. I'm not complaining. All right. So I'll just tell the jury to come back at 1:15.

Will that give you enough time do whatever you need to do?

MR. LEE: Yes, your Honor.

MR. BRINDLEY: Yes, your Honor.

THE COURT: Thank you.

(Proceedings heard in open court:)

THE COURT: All right. Members of the jury, I think I owe you five minutes of lunch from yesterday. So it is approximately 12:10 now, please come back at 1:15 and then we will be even.

So you may leave until 1:15.

(Proceedings recessed from 12:10 pm. to 1:15 p.m.)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	08 CR 625
	)	
vs.	)	Chicago, Illinois
	)	August 27, 2009
ALEXANDER VASQUEZ,	)	1:15 p.m.
	)	
Defendant.	)	

VOLUME 3
TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE CHARLES R. NORGLE, SR.
AND A JURY

APPEARANCES:

For the Plaintiff:	OFFICE OF THE U.S. ATTORNEY 219 South Dearborn Street 5th Floor Chicago, Illinois 60604 BY: MR. STEPHEN CHAHN LEE MS. KRUTI TRIVEDI
For the Defendant:	LAW OFFICES OF BEAU B. BRINDLEY 53 West Jackson Boulevard Suite 1605 Chicago, Illinois 60604 BY: MR. BEAU B. BRINDLEY MS. BLAIR WESTOVER
Court Reporter:	MAELLEN E. PITTMAN Official Court Reporter 219 South Dearborn Street Room 2342 Chicago, Illinois 60604 (312) 435-5576

(Proceedings heard in open court. Jury out.)(Proceedings heard in open court. Jury in.)

THE COURT: All right. Good afternoon, members of the jury.

MR. LEE: Your Honor, the government rests.

THE COURT: All right. Members of the jury, the government has rested its case in chief.

MR. BRINDLEY: Your Honor, may we proceed with the -- well, your Honor, first, can we be heard at the side bar, please?

THE COURT: Yes.

(Proceedings heard at side bar:)

MR. BRINDLEY: Your Honor, at this time the defendant makes a motion for judgment of acquittal as a matter of law based on the evidence that has been presented. The only evidence that actually encased knowledge of Mr. Vasquez is provided by Carlos Cruz, whose testimony was impeached, and discredited in such a way that no reasonable person could find him to be credible. And even when viewed in the light most favorable to the government, a finding of guilty would not be possible by any reasonable juror. So we move for judgment of acquittal.

THE COURT: The motion brought pursuant to Rule 29 is denied. Looking at the totality of the evidence, a reasonable jury could find defendant guilty beyond a reasonable doubt of

each of the two counts with which he is charged.

(Proceedings heard in open court:)

MR. BRINDLEY: Just one moment, your Honor.

THE COURT: Yes.

MR. BRINDLEY: Your Honor, may we proceed with the defendant's case?

THE COURT: Proceed.

MR. BRINDLEY: I would like to start by asking the Court's permission to read a stipulation.

THE COURT: You may read a stipulation.

MR. BRINDLEY: Defense Exhibits Photos A, B, C, and D are photographs of the law enforcement vehicles that were involved in a collision with the Pontiac Bonneville driven by Alexander Vasquez on August 5th, 2008.

Defense Exhibit Photos A, B, C, D, and E were taken by individuals associated with law enforcement after the collision occurred and are admissible as evidence.

So stipulated, counsel?

MR. LEE: Yes, sir.

MR. BRINDLEY: Your Honor, with that I would offer into evidence Defense Exhibits Photos A, B, C, D, and E.

THE COURT: The photographs are received and made part of the record.

(Defense Exhibits Photos A, B, C, D, and E received in evidence.)

MR. BRINDLEY: I would like to call Special Agent James Chupik.

THE COURT: You may call the witness.

MR. BRINDLEY: May I proceed, your Honor?

THE COURT: Proceed.

JAMES CHUPIK, DEFENDANT'S WITNESS, PREVIOUSLY SWORN

DIRECT EXAMINATION

BY MR. BRINDLEY:

Q. Could you please state your name, sir, and spell your last name for the record.

A. James Chupik, C-H-U-P-I-K.

Q. And has your occupation remained the same since you testified earlier in this case?

A. Yes, sir, it has.

Q. Agent Chupik, earlier you gave testimony regarding some vehicles that were involved in a collision.

Did you ever review photographs of the vehicles involved in the collision that day?

A. I have reviewed photographs of the Arlington Heights police cars and one photo of the black Pontiac Bonneville.

MR. MR. BRINDLEY: May I approach the witness, your Honor?

THE COURT: Yes.

BY MR. BRINDLEY:

Q. Agent Chupik, I am showing you what have been marked as

Defense Exhibit Photos A, B, C, D, and E.

Do pictures -- Photos A, B, and C appear to be the same vehicle?

A. Yes, sir, they do.

Q. And is that one of the vehicles that you observed involved in the collision with the Bonneville in Arlington Heights?

A. Yes, sir.

Q. And do Pictures D and E appear to be a different vehicle?

A. Yes, sir.

Q. And do they appear to be the second vehicle that you saw involved in the collision with Mr. Vasquez and the Bonneville in Arlington Heights on August 5th?

A. Yes, they do.

MR. BRINDLEY: Permission to publish these exhibits to the jury, your Honor?

THE COURT: Yes. You may proceed.

BY MR. BRINDLEY:

Q. Beginning with Photo Exhibit C, Agent Chupik, does Photo Exhibit C illustrate damage done to the vehicle you observed?

A. Yes, sir, it does.

Q. And is this one of the two vehicles that you discussed in your previous testimony?

A. Yes, sir, it is.

Q. Let me show you Defense Exhibit Picture D as well.

Would this picture D also show damage to that same vehicle?

A. Yes, sir, it does.

Q. And was it your observation that his damage was also caused by the collision with Mr. Vasquez?

A. Yes, sir.

Q. I am now showing you Defendant's Exhibit Picture A, does picture A appear to be another angle of that same vehicle?

A. That is correct.

Q. And does the damage reflected on this photo also indicate damage that you observed caused in the collision with Mr. Vasquez?

A. Yes, sir.

Q. Agent Chupik, I'm now going to show you -- publish to the jury Defense Exhibit Picture D.

Is this the other vehicle you saw involved in the collision with the Bonneville?

A. Yes, sir.

Q. And does Defense Exhibit Picture D illustrate damage that was done to that vehicle during the collision?

A. Yes, sir.

MR. BRINDLEY: Now publishing Defense Exhibit Picture E.

BY MR. BRINDLEY:

Q. Is that a closer view of the same damage to the same

vehicle?
A. Of the second one, yes, sir.
Q. And that is damage that you observed caused by this collision with Mr. Vasquez's vehicle?
A. Yes, sir.
MR. BRINDLEY: I'm sorry, your Honor, a witness was present.
THE COURT: Yes.
MS. TRIVEDI: Your Honor, can we have a brief side bar?
THE COURT: Yes.
(Proceedings heard at side bar:)
MR. LEE: We'd ask for the witnesses to be excluded before they testify.
THE COURT: It's a little late in coming, but yes, the motion to exclude witnesses is granted. It applies to both sides.
That was inadvertent?
MR. BRINDLEY: I think it was an overabundance of caution. I don't think it was actually a witness, but I couldn't tell.
THE COURT: But in any event, the motion is granted.
MR. LEE: Thank you.
THE COURT: It applies to both sides.
MR. BRINDLEY: Yes.

(Proceedings heard in open court:)

BY MR. BRINDLEY:

Q. Agent Chupik, all of the damage that we observed in Defense Exhibits A through E, was all of that caused by the accident when Mr. Vasquez backed into and struck those vehicles?

A. As well as after he backed out to the south and struck the vehicles, he then when he was pulling forward, struck the vehicles -- at least one of the vehicles again, yes, sir.

Q. And it was all that same incident?

A. Yes, sir.

Q. All right. Agent Chupik, as part of your investigation into this case, did you ever have occasion to conduct an interview with an individual named John Dunleavy?

A. Yes, sir, I did.

Q. Is that the individual who testified here yesterday?

A. Yes, he is.

Q. During your interview with him, did you show him any photographs for him to identify?

A. Yes, sir, I did.

Q. And did he identify for you the person who paid him for the Bonneville?

A. I believe he did on the day I interviewed him, yes, sir.

Q. And do you know whose picture he pointed out?

A. Joel Perez.

Q. Thank you.

Agent Chupik, as part of your investigation into this case, did you review the title documents related to the Pontiac Bonneville?

A. I have.

MR. BRINDLEY: Your Honor, may I approach the witness --

THE COURT: Yes.

MR. BRINDLEY: -- with an exhibit?

BY MR. BRINDLEY:

Q. Agent Chupik, I'm showing you what has been admitted into evidence as Government Exhibit Title 2.

Have you reviewed Government Exhibit Title 2?

A. Yes, I have.

Q. And whose name appears as being the new owner of this vehicle, according to this title?

A. Myra Perez.

Q. Is it Myra Perez?

A. I'm sorry, Myra Vasquez. Excuse me.

Q. Okay.

A. I was looking at the --

Q. Who is supposed to be the seller?

A. Marina Perez.

Q. Now, Agent Chupik, is there a number listed for the new owner, the Myra Vasquez?

A. Yes, there is.
Q. What number is on the title?
A. (773) 910-0452.
Q. Is that number familiar to you?
A. It's one of the telephone numbers assigned to one of the phones found near Perez when he was apprehended.
Q. So that is the one of the phones that was found discarded near Joel Perez?
A. Yes, sir.
Q. Is that also one of the phones that was used to contact Carlos Cruz when Mr. Perez was having conversations with him?
A. I would have to review that chart, but I believe it is, yes, sir.
Q. And just to be clear, that is not the phone that was found in Alexander Vasquez's pocket or registered to him, is it?
A. That is correct.

MR. BRINDLEY: Your Honor, at this time I would request to read another stipulation?

THE COURT: Proceed.

MR. BRINDLEY: It is hereby stipulated and agreed by and between the United States of America by and through its attorney Patrick J. Fitzgerald, United States Attorney for the Northern District of Illinois, and defendant Alexander Vasquez, Jr. individually and through his attorney Beau Brindley, that

the following facts are and should be considered by the jury to be true and accurate:

Defense Exhibit Phone Records Summary is a chart which was generated to organize voluminous phone records admitted into evidence during the government's case in chief. This chart is based on underlying phone records which have been admitted into evidence and is admissible pursuant to Rule 1006 of the Federal Rules of Evidence.

So stipulated, counsel?

MS. TRIVEDI: So stipulated.

MR. BRINDLEY: With that, your Honor, I would request to admit Defense Exhibit Phone Records Summary into evidence.

THE COURT: It is received and may be shown to the jury.

(Defense Exhibit Phone Records Summary received in evidence.)

MR. LEE: All right. May I approach the witness with it?

THE COURT: Yes.

BY MR. BRINDLEY:

Q. Agent Chupik, I am showing you what's now been admitted into evidence as Defense Exhibit Phone Records Summary.

Now, does this appear to be a document that summarizes the many calls listed in the phone records related to the dates in question?

A. Yes, sir.
Q. You did testify -- did you prepare, along with an analyst, a chart that's used by the government?
A. Yes, sir, I did.
Q. And does this chart that we provided, Defense Exhibit Phone Summary Chart, does it appear to include the material that your chart includes?
MS. TRIVEDI: Objection.
THE COURT: Overruled.
You may answer.
BY THE WITNESS:
A. Well, I see here you have highlighted and bolded certain telephone calls that would appear to correspond with our numbering, as well as the coloring. Without comparing it with our chart, I can't say definitively, but it looks that way, yes, sir.
BY MR. BRINDLEY:
Q. Okay. Does it appear that there are additional numbers that were not included on your chart that are included in Defense Exhibit Phone Summary Chart?
A. Yes, sir, that is correct.
Q. Okay. Agent Chupik, during the course of your investigation of this matter, have you had occasion to conduct interviews with Carlos Cruz?
A. Yes, sir, I have.

Q. And when you conducted these interviews with Carlos Cruz, have you summarized them in reports that you prepared?
A. Yes, I have.
Q. Did you conduct interviews with Carlos Cruz on August 19th and August 20th, of 2008?
A. Yes, sir, I did.
Q. And did you prepare reports summarizing the content of those interviews?
A. Yes, I did.
Q. And, Agent Chupik, was it during those interviews that Carlos Cruz first discussed with you statements made by Alexander Vasquez, while Alexander Vasquez was in the car, statements made to Mr. Cruz?
A. Yes, sir.
Q. For the first time on the 19th and the 20th?
A. Yes, sir, 19th.
Q. 19th.

MR. BRINDLEY: One moment, your Honor.

THE COURT: Yes.

MR. BRINDLEY: With that, I have nothing else for Agent Chupik.

CROSS EXAMINATION

BY MS. TRIVEDI:

Q. Agent Chupik, Mr. Brindley asked you on direct examination if Mr. Dunleavy had identified a photograph of Joel

Perez. Do you recall that?

A. Yes, ma'am.

Q. Did Mr. Dunleavy identify anyone else in a photograph as having been present on the date he sold the Bonneville?

A. Yes, ma'am.

Q. Who was that?

A. The defendant, Alexander Vasquez.

Q. And did Mr. Dunleavy identify the defendant as having accompanied Joel Perez and having been with him?

A. Yes, he did.

MS. TRIVEDI: Nothing further.

MR. BRINDLEY: Briefly, your Honor.

THE COURT: Proceed.

REDIRECT EXAMINATION

BY MR. BRINDLEY:

Q. Agent Chupik, counsel was just asking you about Mr. Dunleavy's identification and Mr. Vasquez being present.

Did he identify Mr. Perez as the person who gave him the money?

A. Yes, he did.

Q. Did he identify Mr. Perez as the person that filled out the title?

A. Yes, he did.

Q. And that black Bonneville, was that the same Bonneville where you found the trap compartment?

A. That is correct.
Q. And have you done extensive investigations as a drug enforcement agent involving trap compartments in the past?
A. I don't know if I'd say extensive, I have had many, many cases, yes, sir, that have involved traps.
Q. So is it uncommon for trap compartments to be used by drug dealers?
A. No, it is not.
MR. BRINDLEY: Thank you, Agent. Nothing else --
THE COURT: Anything further, counsel?
MR. BRINDLEY: -- at the present time, your Honor.
THE COURT: Do you have any further inquiry of this witness?
MR. BRINDLEY: I'm sorry, your Honor?
THE COURT: I'm addressing that to the government. Does the government have any further inquiry of the witness?
MS. TRIVEDI: Nothing further, your Honor.
THE COURT: You may step down, Agent. Thank you.
THE WITNESS: Thank you, your Honor.
(Witness excused.)
THE COURT: Please raise your right hand and be sworn.
(Witness sworn.)
THE COURT: Please be seated.

THE WITNESS: Thank you.

JOHN REA, DEFENDANT'S WITNESS, SWORN

DIRECT EXAMINATION

BY MR. BRINDLEY:

Q. Could you please state your name, sir, and spell your last name for the court reporter.

A. My name is John Rea. It's R-E-A.

Q. What is your current occupation, sir?

A. I'm a private detective.

Q. And how long have you been employed as a private detective?

A. Approximately 21, 22 years.

Q. And could you briefly explain to the jury the professional experience you've had that led you to become a private detective?

A. During college I worked as a clerk in the U.S. Attorney's office. Then I was a special agent with the Secret Service, Treasury Department, and then I was appointed as an inspector with the Illinois State Police before going into private practice.

Q. Now, Mr. Rea, did you perform any investigative services for my office with respect to the case of United States versus Alexander Vasquez?

A. Yes, sir, I did.

Q. And did those services require you to photograph any

vehicles that were involved in this case?
A. Yes, sir.
Q. Was one of the vehicles that you photographed a black Pontiac Bonneville?
A. Yes, sir.
Q. Can you tell the jury where you went to take your photographs?
A. It was an impound lot in the Village of Arlington Heights, Illinois.
Q. When you say "impound lot," what do you mean?
A. It was a fenced-in area near their public works garage.
Q. Was it a police impound?
A. I'm not certain of that.
Q. Okay. Who did you have to contact in order to set up the photographing of the vehicle?
A. Detective Sperando of Arlington Heights Police Department.
Q. And when you contacted Detective Sperando, did the two of you agree to a time when you could go with him to the impound lot and look at the vehicle?
A. We did.
Q. And did you go to the impound lot at that scheduled time?
A. Yes.
Q. Do you recall when it was?
A. January 29th of this year.

Q. And when you went to the impound lot, you said it was a fenced-in area?
A. Correct.
Q. And was Detective Sperando with you?
A. No, he was not.
Q. Who was -- was anyone present?
A. Yes. I was with a Commander Galinski of the Arlington Heights Police Department.
Q. And where was the car located?
A. It was parked inside a corner of the fenced-in lot.
Q. What happened when you arrived there? Can you explain what happened?
A. We -- well, Commander Galinsky had a key for the lock to the gate and he was able to unlock the lock, I guess, but he wasn't able to open the gates because of a -- there is a long rod that goes into the ground a few feet that you pull up, but he wasn't able to raise it up.
Q. Was it frozen?
A. I was frozen.
Q. So what did you do?
A. After failed efforts, I just took some photographs from outside the fence.
Q. Were you able to observe the vehicle from outside the fence?
A. Yes.

MR. BRINDLEY: May I approach the witness, your Honor?

THE COURT: Yes.

BY MR. BRINDLEY:

Q. Detective Rea, I'm showing you what has been marked as Defense Exhibits F, G, and H.

Do you recognize these photographs?

A. Yes, sir.

Q. And are these photographs you took of the Bonneville?

A. Yes, sir, to the best of my knowledge.

Q. I'm also going to show you Exhibit I.

Is this another photograph you took of the vehicle?

A. Yes, sir.

Q. And do these photographs show how the vehicle appeared in the impound lot that you went to with the commander from the Arlington Heights police?

A. Yes, they do.

MR. BRINDLEY: At this time, your Honor, I would offer Defense Exhibits F, G, H, and I into evidence.

MR. LEE: No objection, your Honor.

THE COURT: They are received.

(Defense Exhibits F, G, H, and I received in evidence.)

MR. BRINDLEY: Permission to publish?

THE COURT: Yes.

BY MR. BRINDLEY:

Q. Mr. Rea, is this a photograph you took of the rear of the Pontiac Bonneville that was at the impound lot?
A. Yes, sir.
Q. And when you took that photo, did you observe any apparent damage to the rear bumper?
A. Honestly, sir, I can't recall, nor can I really tell from this picture.
Q. From the picture do you see any damage in the picture?
A. I do not.
Q. I'm going to show you Defense Exhibit G.

Is this another photo you took at the impound lot?

A. Yes, sir.
Q. Okay. You observed some damage to the stripping on the side of the vehicle there?

MR. LEE: Objection, your Honor, the photo speaks for itself.

THE COURT: Overruled.

You may answer.

BY THE WITNESS:
A. I can see where the siding has been stripped off and you can see the brackets, yes, sir.
BY MR. BRINDLEY:
Q. I'm going to show you Exhibit H.

Is this another angle of that same vehicle you took?

A. Yes, sir.

Q. And finally publishing Exhibit 1, showing the rear, the rear left side of the vehicle.

Is that another one of the photos you took when you were at the impound lot?

A. Yes, sir.

Q. And in the photo do you see any apparent damage to the left rear of the bumper?

A. I do not in that picture.

Q. Were you ever able to go back and take any photographs from inside the fence?

A. I was not.

Q. And why not?

A. To the best of my recollection, the car had been removed from the yard, according to what I was told.

MR. BRINDLEY: At this point in time I don't have any further questions for Mr. Rea, your Honor.

MR. LEE: Nothing from the government, your Honor.

THE COURT: You may step down.

THE WITNESS: Thank you, sir.

(Witness excused.)

THE COURT: Please raise your right hand and be sworn.

(Witness sworn.)

THE COURT: Please be seated.

THE WITNESS: Do I sit like this?

THE COURT: No.

THE WITNESS: Oh. Sorry.

MYRA VASQUEZ, DEFENDANT'S WITNESS, SWORN

DIRECT EXAMINATION

BY MR. BRINDLEY:

Q. Could you please state your name and spell your last name for the court reporter.

A. My name is Myra Vasquez. And spell my name, V-A-S-Q-U-E-Z.

Q. How old are you, Miss Vasquez?

A. I'm 19 years old.

Q. And where do you live?

A. 7550 West Forest Preserve.

Q. Who do you live with there?

A. I live with my mother, my grandma, and my two sisters.

Q. And what's your mother's name?

A. Marilyn Cortez.

Q. Now, are you currently in college or a student?

A. Yes, I am.

Q. Are you just starting?

A. Yes.

Q. Where are you going to school?

A. Oakton College.

Q. Now, Miss Vasquez, are you familiar with my client, Alexander Vasquez?

A. Yes, I am.
Q. And how is it that you know him?
A. Well, he is my father.
Q. Okay. Do you see him here in court?
A. Excuse me?
Q. Do you see your dad here in court?
A. Yes.
Q. And where is he sitting?
A. Right across.
Q. Can you describe something he is wearing so we have a record?
A. He is wearing a suit and a white shirt underneath the suit.

MR. BRINDLEY: Your Honor, could the record reflect the identification?

THE COURT: Yes.

BY MR. BRINDLEY:

Q. Now, Miss Vasquez, did you see your father regularly around the time of July and August of 2008?
A. Yes, I did.
Q. And where would you see him?
A. Well, he would come by our house to visit us and he would take us out to eat as a family.
Q. When you would see him back in July and August of 2008, did you get to observe what kind of car he drove?

A. Yes, I did.
Q. Did you know what kind of car it was?
A. Yes, I do.
Q. What kind of car was it?
A. It was a Toyota. It was gray.
Q. Now, do you know someone named Joel Perez?
A. Yes, I do.
Q. And how is it that you know Mr. Joel Perez?
A. He is my second cousin.
Q. And did you see Mr. Joel Perez -- did you have the occasion to see Mr. Joel Perez back in August and July of 2008?
A. Yes.
Q. Where did Joel Perez live?
A. He lived right next door to me.
Q. And from your house then, could you see what kind of car Joel Perez drove regularly then?
A. Yes.
Q. And color car was it?
A. It was black.
Q. Do you know what kind of car it was?
A. It was a Pontiac.
MR. BRINDLEY: May I approach the witness, your Honor?
THE COURT: Yes.
BY MR. BRINDLEY:

Q. Miss Vasquez, I'm going to show you some photographs that have been entered into evidence as Defense Exhibits F, G, and H.

Do you recognize that vehicle? Is it familiar to you?

A. Yes, it is.

Q. And where do you recognize it from?

A. This was Joel's car.

Q. And where did you observe that car parked?

A. Sometimes it was sitting in the front and at times I would see him coming in and out of his garage.

Q. Driving this car?

A. Yes.

Q. And you say sometimes it was parked in the front, in the front of what?

A. In the front his house.

Q. Now, your father, Mr. Alexander Vasquez, did he live there at that house with Joel Perez --

A. No.

Q. -- at that time?

A. No.

Q. Did you ever see your father in July or August of 2008 driving that black car that I just showed you in the picture?

A. No, never.

Q. Now I'd like to show you another exhibit.

MR. BRINDLEY: May I approach the witness again, your Honor?

THE COURT: Yes.

BY MR. BRINDLEY:

Q. Miss Vasquez, I'm going to show you what's been admitted as Government's Exhibit Title 2.

Have you seen this document before?

A. Never.

Q. Is this your name that appears on it?

A. That is my name.

Q. But did you fill this out?

A. No.

Q. Did anybody, Mr. Perez or anybody else, ever tell you that your name was going --

MS. TRIVEDI: Objection, hearsay.

BY THE WITNESS:

A. No.

THE COURT: Sustained.

BY MR. BRINDLEY:

Q. Do you have any idea how your name got on this document or who put it there?

A. No, I don't.

Q. Did your father ever talk to you about --

MS. TRIVEDI: Objection.

MR. BRINDLEY: Your Honor, I'm not asking for --

THE COURT: Sustained.

BY MR. BRINDLEY:

Q. Prior to coming to court today, had you ever even observed this document?

A. Excuse me?

Q. Prior to coming here today when I just handed you this, had you even seen it before?

A. Never.

Q. And who is the only person you ever saw drive that black car in August and July of 2008?

A. Joel Perez was the only person I ever seen drive that car.

MR. BRINDLEY: Thank you, Miss Vasquez.

Nothing else at this time, your Honor.

MS. TRIVEDI: May we have one moment, your Honor?

THE COURT: Yes.

CROSS EXAMINATION

BY MS. TRIVEDI:

Q. Good afternoon.

A. Good afternoon.

Q. Miss Vasquez --

A. Yes.

Q. -- the defendant is your father, correct?

A. Correct.

Q. Your mother is Marilyn Cortez?

A. Correct.
Q. You mentioned that you are related to Joel Perez?
A. Yes, I did.
Q. How are you related to him?
A. He is my second cousin.
Q. And how often did you see Joel Perez in July and August of 2008?
A. I would see him often coming in and out of his house.
Q. Did you see him anywhere else other than coming in and out of his house?
A. No.
Q. Were you close to Joel Perez?
A. I was because we are family of course.
Q. Was your father close to Joel Perez?
A. Yes.
Q. Do you know whether Joel Perez was involved in drug dealing?
A. No.
MR. BRINDLEY: Objection, your Honor.
THE COURT: The answer may stand.
BY MS. TRIVEDI:
Q. Do you know whether your father was involved in drug dealing?
MR. BRINDLEY: Objection, your Honor.
BY THE WITNESS:

A. No.

THE COURT: The answer may stand.

MR. BRINDLEY: Your Honor, would you instruct the witness not to answer when an objection is made, please.

THE COURT: You have to be a little faster on your feet.

MR. BRINDLEY: I'm just --

THE COURT: Or if you can't stand, you can make your objection while seated.

MS. TRIVEDI: Nothing further from the government.

THE COURT: Redirect?

MR. BRINDLEY: No, your Honor.

THE COURT: All right. You may step down.

(Witness excused.)

THE COURT: Please raise your right hand and be sworn.

(Witness sworn.)

THE COURT: Please be seated.

MR. BRINDLEY: May I proceed, your Honor?

THE COURT: Yes.

ALEXANDER JASON VASQUEZ, DEFENDANT'S WITNESS, SWORN

DIRECT EXAMINATION

BY MR. BRINDLEY:

Q. Would you please state your name, sir, and then spell your last name for the Court?

A. Alexander Vasquez, V-A-S-Q-U-E-Z.
Q. And how old are you, Mr. Vasquez?
A. 23 years old.
Q. Where do you live?
A. 5252 North Mulligan Avenue in Chicago.
Q. And what do you do for a living currently?
A. I'm sorry?
Q. What do you do for a living currently?
A. I'm currently unemployed.
Q. How do you know -- well, let me rephrase that question.
Do you know my client, Mr. Alexander Vasquez?
A. Yes.
Q. And how is it that you are familiar with him?
A. He is my father.
Q. Can you -- do you see him here in court?
A. Yes, I do.
Q. And can you point him out and describe an article of clothing for the record?
A. He's to the right with the black suit and white t-shirt.
Q. Okay.
MR. BRINDLEY: May the record reflect the identification, your Honor?
THE COURT: Yes.
BY MR. BRINDLEY:
Q. Now, in July and August of 2008, where were you living

back then?

A. I was living with my mom on 5252 North Mulligan.

Q. And who is your mom?

A. Maritza Bernal.

Q. What is her name?

A. Maritza Bernal.

THE COURT: How do you spell the last name?

THE WITNESS: B-E-R-N-A-L.

BY MR. BRINDLEY:

Q. Now, in July and August of 2008, did you see your father, Alexander Vasquez, regularly?

A. Yes.

Q. And where would you see him?

A. I would pass over by his house on Mulligan or he would come by my house or we'd pick something up to eat every once in a while.

Q. Now, you said "his house on Mulligan," where did your father live back in July and August of 2008?

A. He lived on Mulligan, Mulligan and Sunnyside.

Q. Do you know if your father was employed with a job back in July and August of 2008?

A. Yes.

Q. What did he do?

A. He was in heating and cooling.

Q. And how do you know that's what he did?

A. I went on a couple of jobs with him to install some air conditioners.

Q. Okay. Now, back in July and August when you saw your father, did you see what kind of car he drove?

A. Yes, I did.

Q. And what kind of car was it?

A. Toyota Corolla.

Q. Do you know what color it was?

A. It was gray.

Q. Now, in August of 2008, do you remember who was living with your father over on Mulligan when you went to his house?

A. Yes, he was living with his girlfriend. My grandmother was there. She was -- she was sick. She had a stroke. She was paralyzed from her left side.

Q. And where did your grandmother live before she moved in with Mr. Vasquez on Mulligan?

A. She was -- she used to live in the house next door.

Q. House next door to what?

A. To the house next door to Marilyn.

Q. To Marilyn?

A. Yes.

Q. That's Marilyn Cortez?

A. Yes.

Q. And was your grandmother ever in a nursing home?

A. Yes, she was in a nursing home.

Q. Now, Mr. Vasquez, are you familiar with Joel Perez?
A. Yes.
Q. And around August of 2000 -- well, let me ask you this question: Is he related to you?
A. Yes, he is.
Q. How is he related to you?
A. He is my second cousin.
Q. And would you see him with some regularity around August of 2008 as well?
A. Yes, I did.
Q. Do you see what color car he had?
A. He had a black car.
Q. Do you know what kind and make?
A. Pontiac Bonneville.
MR. BRINDLEY: Can I approach the witness, your Honor?
THE COURT: Yes.
BY MR. BRINDLEY:
Q. Mr. Vasquez, I'm showing you some photographs of the vehicle that have been admitted into evidence as Defense Exhibits G, H, and I.
Does that car look familiar to you?
A. Yes, it does.
Q. And who did you see drive that car?
A. Joel.

Q. Joel Perez?
A. Yes, sir.
Q. Did you ever see your father driving this black car?
A. No, I did not.
Q. Back in August of 2008, what's the car that you saw your father drive?
A. I seen him drive a Toyota Corolla. It was gray.
Q. Is that the only car you saw him drive then?
A. Yes, sir.

MR. BRINDLEY: No other questions at this time, your Honor.

MR. LEE: May we have one moment, your Honor?

THE COURT: Yes.

CROSS EXAMINATION

BY MR. LEE:

Q. Good afternoon, Mr. Vasquez.
A. How's it going?
Q. Just to be clear, and maybe for clarity later on, what is your middle name?
A. Jason.
Q. I believe you said on direct examination that you saw -- well, how often did you see Joel Perez in July and August of 2008?
A. Oh, I seen him every once in a while. I would stop by my stepmom's house and cut the grass, and I would see him go in

and out of the house that was next door where he was living.

Q. And you are talking about 7550 and 7554 West Forest Preserve?

A. Yes, 7554, correct.

Q. And you said you saw him.

Did you actually interact with him?

A. No, I just said hi to him or whatever. But yeah, that's, you know, I would see the car parked in front of the house, whatnot.

Q. Did you ever see your father with Joel Perez?

A. No.

Q. Do you know if your father ever spoke with Joel Perez?

A. No, I do not.

Q. Were you with your -- how often did you see your father in July and August of 2008?

A. Oh, I seen him pretty often. He would come over to my house or I would pass by his house on Mulligan where he was living with his girlfriend and his son and my grandmother at the time.

Q. About how many times a week would you see him?

A. Maybe like two times a week, two, three times a week.

Q. So you weren't with him 24 hours a day, seven days a week, were you?

A. No, no, no, not 24 hours a day.

Q. Mr. Vasquez, do you know whether your father was involved

in drug dealing in July and August of 2008?

MR. BRINDLEY: Objection, your Honor, relevance.

THE COURT: Side bar, please.

(Proceedings heard at side bar:)

THE COURT: You must have a better objection than relevance.

MR. BRINDLEY: Beyond the scope. Speculation.

THE COURT: There is no foundation to begin with. The way the question is put it's absolute hearsay, no foundation.

MR. LEE: Well, based on his observations.

THE COURT: Well, you have to lay a better foundation, and drug dealing actually would be a legal conclusion. There are a number of problems related to that question, the form of the question. But relevance, if that's the only objection, I would overrule the objection.

MR. BRINDLEY: I'll amend the objection to lack of foundation.

THE COURT: So many reasons to object. Sustained.

MR. LEE: I will ask it a better way, your Honor.

(Proceedings heard in open court:)

BY MR. LEE:

Q. Mr. Vasquez, in the times that you were with your father in July and August of 2008, did you ever see him engage in any kind of conduct involving any kind of controlled substances?

A. No, I did not.
Q. And did -- in the times that you were with your father or talking to your father in July and August of 2008, did your father tell you anything about him being involved in any kind of way with controlled substances?
A. No.
MR. LEE: If I may have one moment, your Honor?
THE COURT: Yes.
MR. LEE: Nothing further, your Honor.
MR. BRINDLEY: Nothing from me, your Honor.
THE COURT: You may step down.
THE WITNESS: Oh, okay.
(Witness excused.)
THE COURT: Raise your right hand and be sworn.
(Witness sworn.)
THE COURT: Please be seated.

ALEXANDER JASON VASQUEZ, PLAINTIFF' WITNESS, SWORN

DIRECT EXAMINATION

BY MR. BRINDLEY:
Q. Could you please state your name, sir, and spell your last name for the record.
A. Alexander Jason Vasquez, V-A-S-Q-U-E-Z.
Q. And, Mr. Vasquez, how old are you?
A. 24.
Q. And where do you live currently?

A. I live 5048 North Tripp.
Q. And do you know my client, Alexander Vasquez?
A. Yes.
Q. And how is it you know him?
A. He is my father.
Q. Can you point out your father if you see him in court? Do you see your father in court?
A. Yes.
Q. Can you describe some article of clothing that he is wearing for the record?
A. He is wearing glasses, black coat and a white shirt, collared shirt.

MR. BRINDLEY: Your Honor, will the record reflect the identification of the defendant?

THE COURT: Yes.

MR. BRINDLEY: All right.

BY MR. BRINDLEY:

Q. Now, Mr. Vasquez, back around July and August of 2008, did you have occasion to see your father regularly?
A. Yes.
Q. And where is it that you would see him?
A. When I would visit him at his girlfriend's house.
Q. Where did he live?
A. On Mulligan.
Q. Do you remember where on Mulligan?

A. Not the address, but in a single-family home on Mulligan.
Q. And do you know if it was at an intersection, or do you know what the closest intersection is?
A. It was a side street.
Q. It was a side street?
A. Yes, sir.
Q. Okay. Now in July and August of 2008, do you know whether your father had a job?
A. Yes.
Q. What did he -- what was his job?
A. He was into heating and cooling.
Q. When you say he was in heating and cooling, what did he do?
A. He installed air conditioners and heaters.
Q. Now, did you ever, when you were at the house or with your father, did you see what kind of car that he drove?
A. Yes, he drove a 2009 Toyota Corolla.
Q. Do you remember when he got that car?
A. That year.
Q. In '08?
A. Yes, in '08.
Q. So it was one of these situations where they get the 2009 out before --
A. Exactly.
Q. Now, did you ever ride with him in that car?

A. No, but I've seen him in it occasionally.
Q. Did you see it parked at his house?
A. Yes.
Q. Now, when you said you would go and visit him at his house there, who lived there with Mr. Vasquez on Mulligan?
A. His girlfriend, his son, and my grandmother who was sick at the time.
Q. You say she was sick. Can you tell us what was wrong with her?
A. She had a minor stroke and a heart attack and she was paralyzed from one side of her body.
Q. So was she able to walk around by herself?
A. No.
Q. Now, Mr. Vasquez, do you know someone named Joel Perez?
A. Yes.
Q. And do you have any relation to Joel Perez?
A. He is my second cousin.
Q. Okay. Did you have occasion to see Joel Perez --
A. Yes.
Q. -- in August of 2008, around that same time?
A. Yes.
Q. Okay. And, Mr. Vasquez, where is it that you saw Mr. Perez?
A. At his house because he lives right next door to my mother.

Q. And did you go to visit your mother?
A. Yes.
Q. Who is your mother?
A. Marilyn Cortez.
Q. And where does she live?
A. 7550 West Forest Preserve Drive.
Q. And when you were by your mother's, could you see the house where Joel Perez lived?
A. Yes, right next door.
Q. Did you see what kind of car he drove and kept there?
A. He drove a black Pontiac.
Q. I'll show you some photos.

MR. BRINDLEY: If I might approach, your Honor?

THE COURT: Yes.

BY MR. BRINDLEY:
Q. I'm showing you what's been admitted into evidence as Defense Exhibits Photos F, G, and H.

Does this car look familiar to you?
A. Yes.
Q. And where have you seen that car?
A. Parked in front of Joel Perez's house.
Q. Have you ever seen your father in that car?
A. No.

MR. BRINDLEY: No other questions at this time, your Honor.

CROSS EXAMINATION

BY MR. LEE:

Q. Good afternoon, Mr. Vasquez.

A. Good afternoon.

Q. Going back to July and August of 2008, about how often did you see your father?

A. Seen him two, two to three times a week.

Q. And what would be -- why would you get together at those times?

A. Well, I would go and visit him and visit my grandmother because he was helping take care of her.

Q. And I believe you mentioned that your father had a job in heating and cooling?

A. Yes.

Q. Do you know what his hours were on that job?

A. He worked a regular 9:00 to 5:00.

Q. And was that throughout the week?

A. Occasionally.

Q. What do you mean?

A. Well, I've -- I've done a couple jobs with him in heating and cooling.

Q. So just to be clear, you said he had a 9:00 to 5:00 job. Was that every weekday?

A. I'm not sure because I just did a couple jobs with him, but when I would work with him, it was on a regular -- you

know, from 9:00, around that time.
Q. Did your father work every day based on what you understood?
A. Yes.
Q. How often did you see Joel Perez?
A. Not that often, just when I would go visit my mom.
Q. And would you interact with him?
A. Yeah, I would say hi.
Q. Based on what you observed, how often did your father and Joel Perez see each other?
A. Well, from what i know, I'm not really too sure on how often they seen each other.
Q. Do you have a sense of how -- in July and August of 2008, did you know whether they saw each other?
A. No.
Q. You mentioned your father's car, a Toyota Corolla, was that car -- was that car working --
A. Yes.
Q. -- in 2008?
A. Yes.
Q. And just to get a sense of things, you said your father lived -- where did your father live?
A. On Mulligan. I'm not too familiar with the address, but I am familiar with the location and the area.
Q. About how far away is that from where Joel Perez lived?

A. I give it about -- I'm not really too sure.
Q. What part of the city did your father live in?
A. In Chicago, in the west side, northwest side.
Q. And where is 7554 --
A. On the northwest side as well --
Q. So --
A. -- but I'm not too familiar with the distance.
Q. Is it walking distance?
A. No.
Q. About how long would it take you to drive from your father's house to Joel Perez's house?
A. Maybe ten minutes.

MR. LEE: Nothing further, your Honor.

MR. BRINDLEY: Nothing else from the defense for this witness, your Honor.

THE COURT: You may step down.

(Witness excused.)

MR. BRINDLEY: Your Honor, at this time permission the read two stipulations.

THE COURT: Proceed.

MR. BRINDLEY: It is hereby stipulated and agreed by and between the United States of America by and through its Attorney Patrick J. Fitzgerald, United States Attorney for the Northern District of Illinois, and defendant Alexander Vasquez, Jr., individually and through his attorney Beau Brindley, that

the following facts are and should be considered by the jury to be true and accurate:

Exhibit Vasquez Driver's License constitutes a valid State of Illinois driver's license which was issued by the Illinois Department of Transportation on July 7, 2008. This license was produced in the normal course of business and is admissible.

The second stipulation:

It is hereby stipulated and agreed by and between the United States of America by and through its attorney Patrick J. Fitzgerald, the United States Attorney for the Northern District of Illinois, and defendant Alexander Vasquez, Jr., individually and through his attorney Beau Brindley, that the following facts are and should be considered by the jury to be true and accurate:

Exhibit Billing Statement constitutes a billing statement from Toyota Motor Corporation. This billing statement was made and kept in the normal course of business of Toyota Motor Corporation and is admissible.

Your Honor, at this time I would offer into evidence Exhibit Vasquez Driver's License and Exhibit Billing Statement, and ask to publish them for the jury.

THE COURT: Both are received and may be published.

(Defense Exhibits Vasquez Driver's License and Billing Statement received in evidence.)

MR. BRINDLEY: Exhibit Vasquez Driver's License, Exhibit Billing Statement.

At this time, your Honor, we are prepared to call our next witness. It is a bit more lengthy, so if your Honor wanted to take an afternoon break, now would be a good time.

THE COURT: All right. I will accept your suggestion and we'll take a short break.

(Recess. Jury in.)

THE COURT: Before we proceed, the Court did receive a note from the jury and it says: "May we have more coffee?"

MR. BRINDLEY: I think yes is the answer to that question, your Honor, if it's up to me.

THE COURT: Does the government agree?

MR. LEE: Yes, the government agrees.

MS. TRIVEDI: Fully.

THE COURT: All parties agree.

Well, the jury advised the Court that for one reason or another the usual size delivery of coffee was smaller than yesterday.

Mr. Fulbright, I will assign that task to you to resolve.

THE CLERK: I don't know when it's going to get here.

THE COURT: I don't think we can do it today, but for the future.

MR. BRINDLEY: May I proceed with my next witness?

THE COURT: Yes. Please call the next witness.

(Witness sworn.)

THE COURT: Proceed.

MARINA PEREZ, DEFENDANT'S WITNESS, SWORN

DIRECT EXAMINATION

BY MR. BRINDLEY:

Q. Ma'am, could you please state your name and spell your last name?

A. Marina Perez. P-E-R-E-Z. M-A-R-I-N-A.

Q. How old are you, Mrs. Perez?

A. 25.

Q. Where do you currently live?

A. 7554 West Forest Preserve.

Q. And are you married?

A. Yes, I am.

Q. How long have you been married?

A. For about five years.

Q. And, Mrs. Perez, who is your husband?

A. Joel Perez.

Q. Do you have any children with Mr. Joel Perez?

A. Yes, I do.

Q. How old is your children?

A. He is five years old.

Q. And what is his name?

A. Joel Perez.

Q. Mrs. Perez, do you know my client, Alexander Vasquez?
A. Yes.
Q. And how is it that you know him?
A. He is my husband's cousin.
Q. And where is your husband currently?
A. Incarcerated.
Q. Mrs. Perez, did you agree to come here today voluntarily?
A. No. I was subpoenaed.
Q. By my office?
A. Yes.
Q. Did you participate in an interview with me prior to that subpoena?
A. No.
Q. What's that?
A. Did I have -- and -- can you say that again?
Q. Yes.

Did you participate with an interview with me on August 20th and then receive a subpoena after that interview? Is that what happened?

A. Oh, yeah.
Q. Okay.

Now, Mrs. Perez, I'm going to begin by showing you some photographs of a vehicle.

Before I do that, Mrs. Perez, have you ever testified before?

A. Never.
Q. So are you a bit nervous here today?
A. Yes.
Q. If there is ever a point where need a break, just let me know, okay?
MR. BRINDLEY: May I approach, your Honor?
THE COURT: Yes.
BY MR. BRINDLEY:
Q. Mrs. Perez, I'm going to show you what's been admitted into evidence as Defense Exhibits F, G, and H.
Mrs. Perez, do you recognize that automobile?
A. Yes.
Q. Is that a black Pontiac Bonneville?
A. Yes.
Q. Where do you recognize it from?
A. It was my husband's car.
Q. Do you remember when your husband Joel Perez got that car?
A. Probably a couple of months before the day he was incarcerated.
Q. All right. Now, when he got the car do you know whose name Joel put on the paperwork?
A. I have no idea.
Q. Did you ever observe Joel Perez give that car to Alexander Vasquez?

A. No.
Q. Who drove that car regularly?
A. He did.
Q. Other than August 5th which we will talk about later, did you ever see Alexander Vasquez drive that car?
A. No.
Q. Did you observe where that car was regularly kept and stored during July and August of 2008?
A. Our house in our garage or in front.
Q. Did Joel drive it back and forth from there everyday?
A. Yeah, that was his car.
Q. Now, Mrs. Perez, did you know anything about your husband Joel, whether he put some sort of compartment in his car?
A. I didn't know anything like that.
Q. Did he talk to you about any of the things like that that he had done?
A. No.
Q. I'd like to talk to you about August 5th, 2008, the day your husband was arrested.

August 5th, the morning, were you with your husband, Joel Perez?
A. Yes, I was.
Q. And what did you and Mr. Perez do that morning?
A. We went shopping in Oak Brook mall. I was expecting at the time. We were just looking at baby clothes. Just shopping

around with our son.
Q. You say you were expecting a second child?
A. Yes.
Q. Did you ever have that child?
A. No.
MS TRIVEDI: Objection.
THE COURT: Sustained.
BY MR. BRINDLEY:
Q. Okay. Now, Mrs. Perez, you said you were with your husband and your son and you went shopping. Around what time did you leave to go shopping?
A. In the morning. Probably around 11:00 or so.
Q. All right. And you told you went to the mall. What stores did you go to?
A. Macy's, walked around, it's an outdoor mall. Macy's, Sephora, Victoria's Secret. More time Macy's.
Q. And, Mrs. Perez, when you went to go shopping that day with your husband what car did you take?
A. We were in his car.
Q. The black Bonneville I showed you the pictures of?
A. Yes.
Q. Did you say yes?
A. Yes.
Q. That morning on August 5th, 2008, before you left, had Alexander Vasquez been at your house or had access to that car

that you saw?

A. No. We woke up and left.

Q. You say you woke up and left. You mean you and your husband?

A. Me, my husband and my son.

Q. Do you know whether Joel Perez had put any money in that car the day before or sometime earlier that morning? Do you have any idea?

A. No. I would have took it.

Q. If you know it was in there?

A. Yeah.

Q. How long were you shopping?

A. Several hours. Several hours.

Q. Now, on August the 5th after you finished shopping where were you and Joel and your son going to go?

A. We were going to go to Alexander's house to visit my husband's aunt.

Q. So you were going to go to Alexander's house. You are speaking of of Alexander Vasquez?

A. Yes.

Q. Is the man you are referring to as Alexander present in court?

A. Yes.

Q. And can you identify him and point him out by describing something he is wearing?

A. Glasses. Right there.

MR. BRINDLEY: Your Honor, if we can have an in-court identification reflected on the record.

THE COURT: Yes.

By MR. BRINDLEY:

Q. And where did Alexander live?

A. On Mulligan.

Q. Okay. And you said you went there with your husband Joel and you guys went there to see Mr. Vasquez's aunt. Was there something that you were going to do for Mr. Vasquez's aunt, I'm sorry, Joel's aunt?

MS. TRIVEDI: Objection. Relevance.

THE COURT: Sustained.

MR. BRINDLEY: Okay.

BY MR. BRINDLEY:

Q. Had Mr. Vasquez -- did Joel Perez -- did you observe him exchange telephone calls with Mr. Vasquez when you were shopping?

A. Yeah. They did every day.

Q. And you said you were going to the house, this house where Alexander Vasquez lived. Did Alexander and Joel live in the house on forest preserve drive?

A. He lives with his family. Joel lived with me and he lived with his family?

Q. Who was his family?

A. His girlfriend, young son, and mother.
Q. Is that mother, is that Joel's aunt?
A. Yes.
Q. Did you go to Alexander Vasquez's house?
A. Yes.
Q. About what time did you get there?
A. About the afternoon, early afternoon. I'd say 3:00, 3:30. Around there.
Q. Okay. And who was there when you got there?
A. Alexander was there, his son was there, his mom was there.
Q. And what did you and Mr. Perez do after you arrived at Mr. Vasquez's house?
A. He was helping him move his mom, helping her change her clothes, move to the living room to sit.
Q. When you say "help move her," what do you mean?
MS. TRIVEDI: Objection.
MR. BRINDLEY: Your Honor, I'm trying to describe the events that lead to the day.
THE COURT: Are you going to tie this up?
MR. BRINDLEY: Yes. Yes.
THE COURT: All right. Proceed if you going to tie it up.
MR. BRINDLEY: Yes.
BY THE WITNESS

A. She had a stroke and she could not move. She was in a wheelchair.
BY MR. BRINDLEY:
Q. And so Mr. Perez helped Mr. Vasquez move her?
A. Yes. She is a very heavyset woman.
Q. Now, did you and Mr. Perez often go to the house for that purpose?
A. Yes.
Q. How often?
A. Every other day. Sometimes daily.
Q. After you got to the house and you said that Joel helped Alexander move his mother, did Joel stay at Alexander's house?
A. No.
Q. What happened?
A. He told me that he was going to leave. We started arguing because I didn't want him to leave. We were just back and forth. He had a phone call and he left.
Q. Okay. Do you know who he was supposed to be going with?
A. No.
Q. You said you argued with him. What were you arguing about?
MS. TRIVEDI: Objection.
THE COURT: Sustained.
BY MR. BRINDLEY:
Q. When Joel left, did he leave in the black car that you

drove over there?
A. I don't know. Somebody just picked him up.
Q. Did you see who it was?
A. No.
Q. Where was the black Bonneville parked at that time?
A. In the back of the house on Mulligan behind the garage.
Q. When you say behind the garage, was it immediately behind the garage door?
A. Yes.
Q. And what were you planning to do after Joel left? Let me withdraw the question and ask you this question:

Who had the keys to the black car after Joel left with this friend of his?

A. He left him and he asked me if I wanted to -- that I could pick him up where he was going. And I was arguing with him about not going.

And he wanted to go.

And I was mad and just nauseas about everything. And I just told him just go leave me alone

MS. TRIVEDI: Your Honor, objection. Side bar.

(Proceedings heard at side bar:)

MS. TRIVEDI: Your Honor, the witness is detailing a conversation she had with the defendant. We'd ask that be stricken and the jury advised.

THE COURT: All that is hearsay.

MR. BRINDLEY: Your Honor, first of all, she hasn't testified about any conversation with the defendant. She mentioned something that Joel Perez said to her.

THE COURT: That's hearsay.

MR. BRINDLEY: Those are not offered to prove as to the --

THE COURT: What is the relevance?

MR. BRINDLEY: Because they are offered to show her future course of conduct and why she chose to do what she did with the keys to the car, and how Mr. Vasquez got that car. That's all it goes to illustrate. Not the truth of the matter.

MS. TRIVEDI: Can we have a proffer as to what she is going to say for that?

THE COURT: She is going to say what?

MR. BRINDLEY: Here is what's going to happen, your Honor: She is going to testify that Mr. Perez told her -- she just did testify Mr. Perez told her he was leaving and he wanted her to come and pick him up when she was done.

And then she hands the keys to my client.

She will testify that because of that she did not want to go and pick him up for various reasons. He asked Mr. Vasquez to go instead. And she gave him the keys.

And so the testimony about what Mr. Perez said to her illustrates the reasons why the jury gave the keys.

That's all. Not the truth.

THE COURT: All right. You may proceed.

(Proceedings heard in open court:)

BY MR. BRINDLEY:

Q. Mrs. Perez, after your husband told you he was leaving and about you going to pick him up, what was your understanding of what you were supposed to do later on?

A. My understanding was --

Q. What did you think you were supposed to do when he called?

A. When he called me, to go pick him up.

Q. Do you know where he was going?

A. He said he was going to, like, a suburb, Arlington Heights, with his friends, and that was it.

Q. Okay. Now, did you want to go and pick him up?

A. No. I was arguing with him.

Q. And so after you -- after he left, after Mr. Perez left, did you ever go to pick him up?

A. No.

Q. So what did you do?

A. I told Alexander to go.

Q. You asked Alexander to go?

A. Yes.

Q. And why is it that you asked Alexander to go instead of you go?

A. I was angry with him. I didn't want to go.

Q. All right. And did you agree to do anything for Alex if he would agree to go get Joel?
A. I was going to stay with his mother.
Q. Did Mr. Vasquez agree to go?
A. Yes.
Q. Did you observe Mr. Vasquez around that time make a telephone call to find out about where Perez was going to be?
A. Yeah. I imagine so.
Q. Before Joel left that day with this friend of his, while he was at Mr. Vasquez's house, did you ever observe a time where he spoke to Mr. Vasquez outside your presence?
A. It was real brief when he got there and he left.
Q. So you're saying Joel was there for very long?
A. No.
Q. During the brief time he was there did you see him have any conversation with Mr. Vasquez or leave and go somewhere with Mr. Vasquez that you didn't observe?
A. All I observed was anything that had to to with his mother.
Q. So let me ask you a question. Did you ever see him go off in another room with Mr. Vasquez by themselves?
A. I don't remember. No.
Q. Did you have him talk to Alex -- did you ever hear Mr. Perez talk to Alexander Vasquez about what he was going to do or where here was going?

MS. TRIVEDI: Objection.

THE COURT: Overruled.

You may answer.

BY THE WITNESS:

A. No.

BY MR. BRINDLEY:

Q. Do you remember approximately what time Joel left with his friend?

A. Had to be 4:00 o'clock.

Q. And was it after that that you asked Alexander that if he would go and pick him up?

A. It wasn't right away, but some moments afterwards. I told him he should go. I don't want to go.

Q. And you said that he agreed, right? Yes?

A. Yes. Yes.

Q. Now, when Alexander Vasquez went to go and pick up Joel Perez, did you give him the keys to the Bonneville right away when he left?

A. No. He walked out and then walked back in and told me that I was blocking his car.

Q. Where was Mr. Vasquez's car parked?

A. In the garage.

Q. Was that a gray Toyota? Is that the kind of car that was there?

A. Yes.

Q. And where was the Bonneville?
A. In the back.
Q. Directly behind it so it couldn't get out?
A. Um-hum, yes.
Q. So did Mr. Vasquez actually go out to the Toyota first?
A. Yeah, I think so. I heard the door open and close.
Q. And then he come back inside because the car was blocking it?
A. Yes.
Q. And so when Mr. Vasquez came back inside, what did you do?
A. I told him to take the car, the keys.
Q. And so you gave him the keys to the Bonneville?
A. Yes.
Q. And then what were you planning to go?
A. I was going to stay there with his mother and the kids and just watch TV and wait for him to come back.
Q. Did your husband Joel Perez and Alexander Vasquez ever make it back from Arlington Heights?
A. No.
Q. Mrs. Perez, on August 5th, 2008, was Alexander Vasquez the person who was supposed to go get Joel Perez?
A. No.
Q. Who was?
A. I was.

Q. Did you ever hear Joel Perez ask you --

MS. TRIVEDI: Objection.

THE COURT: Sustained.

BY MR. BRINDLEY:

Q. Mrs. Perez --

A. Yes.

Q. -- did you know anything about your husband going out and being involved in some kind of a drug deal that day before he left?

A. I would have stopped him. I didn't want him to leave. That's why I was arguing with him the whole time.

Q. And who was it that asked Alexander Vasquez to go to Arlington Heights?

THE COURT: Can you lay a foundation for the conversation: who was present, what time, and where this is occurring, so the jury can pick up on the chronology and know who was speaking and where and under what circumstances.

BY MR. BRINDLEY:

Q. At Mr. Vasquez's house on Mulligan, after Mr. Perez departed you said around 4:00 o'clock, who was it that asked Mr. Vasquez to go to Arlington Heights?

A. I did.

Q. And when you asked him did you have any knowledge that there was anything in the car or the Bonneville in terms of money?

A. No.
Q. When you asked him did you actually expect that he was going to take the Bonneville at first?
A. No. I forgot that it was blocking the garage.
MR. BRINDLEY: No more questions, your Honor.
THE COURT: Cross.
MS. TRIVEDI: May we have a moment, your Honor?

CROSS EXAMINATION

MS. TRIVEDI:
Q. Good afternoon.
A. Good afternoon.
Q. Mrs. Perez,, you previously testified that you were arguing with your husband that day and that you didn't want him to leave. You said you were arguing with him about drug dealing?
A. I didn't --
Q. Did you not say that -- I believe that's what I heard. What were you arguing about? I was arguing --
THE COURT: Just a minute. There are several questions pending.
What is the first question you want the witness to answer?
MS. TRIVEDI:
Q. Mrs. Perez, you were arguing with your husband that day?
A. Correct.

Q. On August 5th, 2008?
A. Correct.
Q. And you were upset with him on August 5th, 2008?
A. Yes.
Q. Did that argument occur at Alexander Vasquez's house?
A. It occurred -- it continued from the car to getting there. We were arguing. I didn't want him to leave. I wanted him to stay with me.
Q. What the time did you -- what time you get in the car?
A. Let's see --

MR. BRINDLEY: Objection. Foundation as to what, which time she got in the car.

THE COURT: Overruled.

You may answer the question.

BY THE WITNESS:

A. What do you mean? In the morning or leaving the mall?

BY MS. TRIVEDI:

Q. Sure.

When you were on your way to Alexander Vasquez's house, what time was that?

A. Well, I got there between 3:00, 3:30. It takes about a half hour.

Probably 2:00, 2:30. Around there.

Q. Okay. So it takes about an hour, you were saying?
A. Hour, 45 minutes.

Q. To get from where to where?
A. From Oak Brook to Chicago.
Q. And from where in Oak Brook did you leave?
A. From the Oak Brook mall.
Q. And where did you go in Chicago?
A. To Mulligan.
Q. So you went directly to Mulligan?
A. Yes.
Q. And what was the intersection where the house was? What was the closest intersection? Because you mentioned you had gone there often.
A. The main streets or side streets?
Q. Let's do both.
A. Irving, Narragansett, Mulligan and Sunnyside.
Q. All right. And how often did you go there?
A. Quite frequently.
Q. How long have you known Alexander Vasquez?
A. Longer than I have been married. For a while.
Q. How many years?
A. Since seven years, I believe.
Q. And during the time that you've known him that seven years, has he ever lived with you?
A. No.
Q. You mentioned you went every -- how often did you go a week to Mulligan?

A. At least four times or so. Or maybe more or less. I'm not quite sure of the specifics.

Q. Over the course of the seven years, did you see Alexander Vasquez pretty regularly?

A. No, not -- not that often, no.

Q. Except for the four times a week that you saw?

A. Well, when he had his mother, yes.

Q. But other than that?

A. No.

Q. Do you know if your husband saw Alexander Vasquez?

A. Yeah.

Q. And what was -- starting seven years ago your husband saw Alexander Vasquez regularly, is that right? Or was it before that?

A. Well, they are family. I imagine he has seen him since the beginning of his life.

Q. But you saw Alexander Vasquez starting in about seven years ago. That would put it about 2002?

A. Yeah, yes.

Q. Where would you see Alexander Vasquez in 2002?

A. Where would I see him? We'd go out to eat. Family dinners, Mother's Day. Family events.

Q. Were there times when your husband would go out with Alexander Vasquez alone?

A. Through the course of his lifetime, possibly so, yes.

Q. Let's say since you have known Alexander Vasquez. Did your husband go out alone with Alexander Vasquez?

A. Yes.

Q. Would you always know where they| going?

A. No. My husband -- how do I explain? No, he did not explain everything to me.

Q. Starting in 2002, you saw Alexander Vasquez at family event, at dinners. And was your husband at that time going out with Alexander Vasquez alone?

A. I just met my husband. I was mostly with him a lot alone.

So, no, we just started dating, I mean. I don't know.

I don't really understand your question. Were they alone when I first met him or --

Q. I'm sorry if I'm being unclear. That's not my intent.

What I'm asking is in 2002 would your husband and Alexander Vasquez, would they have ago off alone that you knew of that you could observe?

Did they do things without you that you knew about?

A. Well, yes.

THE COURT: You have got about four questions pending.

Ask one at a time. Give the witness an opportunity to respond.

What is the first question?

MS. TRIVEDI: Thank you.

MS. TRIVEDI:

Q. In 2002 would you observe your husband and Alexander Vasquez go off and do things without you?

A. Yes.

Q. You started dating your husband you said in 2002?

A. Yes.

Q. Did anything unusual happen in 2002 with respect to your husband?

MR. BRINDLEY: Objection, your Honor.

THE COURT: Overruled.

You may answer.

BY THE WITNESS:

A. Can you repeat that question?

BY MS. TRIVEDI:

Q. Sure.

Was there anything unusual that happened in 2002 with respect to your husband?

MR. BRINDLEY: Your Honor, I object to vague.

Anything in all of 2002?

THE COURT: You can refine the question. Be more explicit.

MS. TRIVEDI:

Q. Did you know of any contacts your husband had with law

enforcement in 2002?

A. Yes. He was arrested.

Q. What was that for?

A. For, I think, narcotics.

Q. Did you know the specific factual details about that?

A. No.

MS. TRIVEDI: Your Honor, can we have a quick side bar?

THE COURT: Yes.

(Proceedings heard at side bar:)

MS. TRIVEDI: Your Honor, I apologize for any inconvenience this may cause, but would it be all right if we can just a quick break?

We are about to enter some territory, and I just want to collect my thoughts and make sure I proceed --

THE COURT: With an abundance of caution.

All right. We are will take a short break.

(Proceedings heard in open court:)

THE COURT: There will be a brief recess. The witness may leave the stand, but do not leave the area.

MR. BRINDLEY: You may leave for a few minutes.

Would you admonish the witness not to speak to anybody, just so we don't have any problems.

THE COURT: Please do not speak to anyone during the recess.

Do you understand that?

THE WITNESS: Yes.

THE COURT: Will you comply?

THE WITNESS: Yes.

THE COURT: You may leave.

(Jury out).

THE COURT: All right. Brief recess.

(Recess.)

MS. TRIVEDI:

Q. Good afternoon again, Miss Perez.

A. Good afternoon.

Q. Let's focus on August 5th of 2008.

What time was it that your husband asked you to give him a ride?

A. It was -- we got there at 3:30. Excuse me. It was in between the time we got there -- well, it was right when he was about to leave. He left at 4:00 o'clock.

4:00, around there.

Q. And what time was it that Alexander Vasquez left to give him a ride?

A. I want to say -- we were there for an hour. So that would probably be at 5:00 o'clock.

Q. Now, talking about that day more generally, Mrs. Perez, you testified earlier that you had gone to the Oak Brook mall with your husband?

A. Um-hum.
Q. When you were at the mall with your husband, were you with him every single moment you were at the moment?
A. What do you mean? Like in every store? Yes, we were together.
Q. No, I mean every single moment. Were you with him every single moment he was in the mall?
A. Well, no.
Q. There were times when he wasn't with you while he was in the mall with you?
A. Well, we were in the mall, but I would try on something or go off in a different section of the store.
Q. And did you hear every single telephone conversation your husband had that day?
A. No, no. I didn't.
Q. And were you with your husband on the night of August 4th, 2008, Miss Perez?
A. Yes.
Q. Were you with him every single moment that night?
A. At night, I don't remember. I would like to say yes, but I'm not a hundred percent positive. We were together that night, yes.
Q. But were there moments when he wasn't in your presence?
A. Yes.
Q. And is the same true for August 4th during the rest of

the day?
A. Can you repeat that?
Q. Let me clarify it. I'm sorry.
On August 4th, 2008, were there times when were you not in your husband's immediate presence?
A. Yes.
Q. It is possible on August 4th, 2008, that your husband could talk to someone on the phone without you hearing it, correct?
MR. BRINDLEY: Objection. Speculation.
THE COURT: Sustained. Form of the question.
MS. TRIVEDI:
Q. You didn't hear every phone call your husband had on August 4, 2008, did you, Mrs. Perez?
A. No, that would be impossible. No.
Q. And you didn't hear every phone call your husband had on August 5th, 2008, did you?
A. No.
Q. You weren't in his presence the entire day?
A. We were -- it's not like he wasn't in the same place as me. We were together.
But, no, I wasn't right next to him listening to everything he said, no.
MS. TRIVEDI: Nothing further, your Honor.
THE COURT: Redirect.

MR. BRINDLEY: Very, very briefly, your Honor.

REDIRECT EXAMINATION

BY MR. BRINDLEY:

Q. Mrs. Perez, a couple of questions were asked to you about the house there on Forest Preserve Drive.

Do you know if Alexander Vasquez had ever lived there at one of houses on Forest Preserve Drive previously before he moved to Mulligan?

A. Yes.

Q. He did?

A. Yes.

Q. Do you know if Alexander's mom used to live in that house?

A. Yeah. She used to live in the house.

Q. Before you lived there?

A. Yeah. She had a stroke.

MR. BRINDLEY: No further questions.

MS. TRIVEDI: Nothing further from the government.

THE COURT: All right. You may step down.

MR. BRINDLEY: Your Honor, can we have a side bar?

(Proceedings heard at side bar:)

MR. BRINDLEY: Your Honor, now that the cross examination of our final witness is complete, before the defense is complete, the defendant is requesting to have a consult with me about his best possible testimony.

THE COURT: So you are looking for a short recess.

MR. BRINDLEY: That's what I mean. I apologize to do it right after the other one, but he is asking me, and I think that's what we need to do.

THE COURT: Okay. Let's get some idea -- well, we will let it end there. I don't want to press the issue at this time.

So all you are asking for is a brief recess.

MR. BRINDLEY: That's right.

THE COURT: All right. So it is. Yes.

MR. BRINDLEY: Thank you.

(Proceedings heard in open court:)

THE COURT: The request for a brief recess is granted.

You may leave the room for a few minutes, members of the jury.

(Recess.)

MR. BRINDLEY: Your Honor, at this time I would report to the Court that Mr. Vasquez is not going to testify. If your Honor would admonish him on his right, I would appreciate it.

THE COURT: The Seventh Circuit in some opinions have said that the Judge should pull the oar and advise the defendant directly of his constitutional rights.

There are other opinions that suggest that that's not

the right way to proceed.

But what is significant here is that the Court determines whether counsel has advised his client of his constitutional rights.

And, in that regard, counsel, what have you told your client?

MR. BRINDLEY: I told Mr. Vasquez that he has an absolute right to testify, and the only person that can make that decision is him.

I consulted with him about that before this trial began, explained it to him, went over in detail potential testimony.

He has now heard all of the testimony following all of the evidence.

I consulted with him that he has an absolute right, if he wishes, to take the witness stand in his own behalf and testify, and he also has an absolute right not to testify. It cannot be held again him.

I advised him of all of these things a moment ago in the lock-up, and he has instructed me that he does not wish to testify.

THE COURT: Did you also tell him that if he did decide to testify, that he would make a statement under oath or affirmation and then the government would have the opportunity to cross examine him after his statement?

MR. BRINDLEY: I informed him of that, yes.
THE COURT: Did you also tell him that it is not his burden to prove his innocence, but that it is the government's burden to prove his guilt beyond a reasonable doubt?
MR. BRINDLEY: Yes, I did.
THE COURT: You told him these things, and much more?
MR. BRINDLEY: Yes. Much, much more.
THE COURT: And you are representing, then, that your client has decided to remain silent?
MR. BRINDLEY: That is correct.
THE COURT: Mr. Vasquez, did you hear all of that?
THE DEFENDANT: Yes, your Honor.
THE COURT: What have you decided to do?
THE DEFENDANT: I decided not to testify, your Honor.
THE COURT: Very well.
Do you then intend to rest, counsel.
MR. BRINDLEY: Yes, your Honor.
THE COURT: Now, will the government put on any rebuttal?
MR. LEE: The government does plan to put on a rebuttal case, your Honor. We will not be ready to proceed with that rebuttal case this afternoon, but we able to do so tomorrow.
THE COURT: All right. That's a critical point.
I have a motion call tomorrow with numerous motions

and statuses. And also, I think we have scheduled at least two and maybe even three changes of plea in criminal matters.

So it will be a very busy and active morning.

And I don't think that there would be any point in bringing the jury in tomorrow, Friday, just for the fternoon, because we could not wrap up the entire case tomorrow in any event, taking into account closing arguments, and so on.

So I think the better course of action would be to tell the jury that they will not be required to come in tomorrow, Friday, but that they shall be here Monday at 10:00 o'clock. And we will take it from there.

So if you are going to put on a rebuttal case, you would proceed with that Monday at 10:00 o'clock.

MR. LEE: Yes, your Honor.

THE COURT: Is there any objection to that procedure?

MR. BRINDLEY: No, your Honor. Not in light of the Court's schedule.

THE COURT: All right. So then you will rest in front of the jury.

MR. BRINDLEY: Yes.

THE COURT: And I will tell the jury that there may be some additional evidence presented in the case Monday, but will use the term "there may be," without committing the government to that position.

You may change your mind over the weekend, but that's

strictly up to you.

All right. So we will ask the jury to come in.

(Jury in.)

THE CLERK: Court is in session. Please be seated.

THE COURT; Anything further, counsel?

MR. BRINDLEY: Your Honor, at this time the defendant rests his case.

THE COURT: All right. Members of the jury, the prosecution has rested its case in chief. The defense has rested its case.

It may well be that the government will put on some additional testimony in this case. But beyond that, here is where we stand.

I have numerous matters to deal with tomorrow, and there would be no way that we could complete this trial tomorrow in light of closing arguments and other matters we would have to deal with.

And so the better course of action I think is to say that you are to return Monday at 10:00 o'clock.

You not required to be here tomorrow whatsoever.

And we would expect that the trial then may end Monday, and that you would have the case Monday for deliberations.

That would be the objective.

And so I will hold you no longer today. But you now

know the prosecution has rested, the defense has rested, but there remains the possibility that the government may call additional witnesses Monday. That remains to be seen.

So with the usual admonitions, you are excused and you are to return Monday at 10:00 o'clock. And we will put the burden on Mr. Fulbright to be sure that there is a larger pot of coffee.

You are excused for the day.

(Jury out.)

THE COURT: Okay. Court is in session. The jury has left the room.

You can use tomorrow to try to resolve any jury instruction issues that you have.

If there are jury instruction issues that do remain, however, you can let me know about that tomorrow and we will deal with them Monday.

But I would encourage you to try to work this out by agreement.

The government has submitted a proposed set of jury instructions and verdict forms. And so do what you can to work it out.

And, if not, I will resolve the disputes.

All right. So Monday.

Thank you.

MR. LEE: Thank you, your Honor.

MR. BRINDLEY: Thank you, your Honor.

(Proceedings adjourned at 4:00 p.m. to Monday, August 31, 2009, at 10:00 a.m.)

RECORD
AND
BRIEFS

No. 11-199

In The

Supreme Court of the United States

ALEXANDER VASQUEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

JOINT APPENDIX
VOLUME II PAGES 457-785

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	08 CR 625
	)	
vs.	)	Chicago, Illinois
	)	August 31, 2009
ALEXANDER VASQUEZ,	)	10:00 a.m.
	)	
Defendant.	)	

VOLUME 4
TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE CHARLES R. NORGLE, SR.
AND A JURY

APPEARANCES:

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Court Reporter:	MAELLEN E. PITTMAN Official Court Reporter 219 South Dearborn Street Room 2342 Chicago, Illinois 60604 (312) 435-5576

(Proceedings heard in open court. Jury out.)

THE CLERK: 08 CR 625, United States versus Alexander Vasquez, Jr.

Trial.

MR. LEE: Good morning, your Honor.

Stephen Lee and Kruti Trivedi for the United States.

MR. BRINDLEY: Good morning, your Honor.

Beau Brindley and Blair Westover on behalf of Alexander Vasquez, who is present before the Court.

THE COURT: All right. Good morning.

All of the jurors are here. They, of course, are not in the courtroom.

The government has filed a motion to continue the trial, and the defense has filed a written objection to the motion.

So the government may proceed on its motion.

MR. LEE: Yes, your Honor.

To begin with, the government is prepared to begin putting on its rebuttal case today. We plan on calling Marina Perez, who testified last week, and who is now represented by Gal Pissetzky, who informed the government that he is not here at this time, he is coming back from Joliet and should be here shortly.

THE COURT: So he would be counsel for her?

MR. LEE: Yes.

We also plan on presenting evidence showing inconsistencies between Marina Perez's testimony last week and other evidence in the government's case.

THE COURT: So you would be going into prior inconsistent statements?

MR. LEE: Well, this evidence I was talking about is something separate from Marina Perez herself. We also are considering calling Joel Perez, Marina Perez's husband who pled guilty before this Court about two weeks ago.

Now, but before we proceed we want to bring to the Court's attention certain information that the government has learned since we last appeared here on Thursday.

Specifically, we want to bring to the Court's attention certain recorded conversations between Joel Perez and Marina Perez.

As we often do in preparation for trials, the government requested copies of nonattorney calls by the incarcerated defendants in this case. At the time of our request, that was Joel Perez and Alexander Vasquez, who were both at that time going to trial.

We did not receive calls for either Mr. Perez or Mr. Vasquez until a few days before trial. By that time Mr. Perez had pled guilty and it was only Mr. Vasquez that was standing trial. We produced copies of the calls to Mr. Vasquez's lawyer and we did a spot-check review of the

calls, but we did not review Mr. Perez's calls at the time given that he had pled guilty and was not standing trial. At that time we had no reason to believe that Marina Perez would say anything that was inconsistent with her husband's plea agreement.

After Mrs. Perez testified last Thursday, we began reviewing those calls between Mr. Perez and Marina Perez, and we requested additional calls that we received on Friday.

Basically, we wanted to bring some of those calls to your attention. As we believe you can hear for yourself, these calls raise some issues for the Court to consider.

At this time, based on our review of the calls and based on our knowledge of the case and the overall investigation, our view of these calls is that Marina Perez had discussions with Mr. Vasquez's lawyer on or about August 1st, in which they discussed having Mr. Perez and/or Marina Perez and/or Marilyn Vasquez, the defendant's wife, cooperate in some manner to help achieve Mr. Vasquez's acquittal.

We have a copy of a draft transcript of this call and the other two calls we intend to play, which we can provide you.

Basically though, I thought I might just read you a little preview. In the calls Marilyn Perez says to her husband, "Beau is trying to make you look like you are fucked so he can use the strategy." There is also references to

"throw Joel down" -- and this is Marina Perez apparently talking about what Mr. Brindley has told her -- "throw Joel Perez down. It's better to save this guy and throw him down."

There is also reference to "If we talk about this car, well then, you know, Alex would be okay. I'm like, what? Alex came too. If Joel is so much fucked, then so is he."

As you may recall, probably the key testimony from Marina Perez last week was concerning the car and how that particular car, the Pontiac Bonneville, came to be in Arlington Heights later on in the day of August the 5th.

Basically after that, Marina Perez had another discussion with Mr. Vasquez's lawyer on or about August 5th. This is a quote from the draft transcript. Marina Perez saying, "Just because you're there, then that means everybody is in the shithole. He is trying to be -- to fast talk me. Trying to make me say well, fine, argue whatever you want to argue. I'm going to tell Alex to let you argue whatever you want to argue."

Now, our interpretation of that call is that Marina Perez was agreeing to allow Mr. Vasquez, the defendant, to allow Mr. Vasquez's lawyer to make whatever arguments he wanted to make, with the implication that Marina Perez would provide testimony which would enable Mr. Vasquez's lawyer to do so.

The third call we want to play is about August 12th. This follows extensive discussions between Marina Perez and

Joel Perez about their contact with Mr. Vasquez's lawyer and their understanding that Mr. Vasquez's lawyer was providing them with legal advice with regards to Joel Perez's sentencing and an indication that he would assist in making certain motions with regards to Mr. Perez's sentencing.

Now, at this time of the call, August 12th, Mr. Perez was represented by Mr. Lipuma, and this was -- August 12th is about five days before Mr. Perez pled guilty.

And I'm going to read just a few quotes from Joel Perez. "A blind plea would be good, then he can guarantee this and that."

Later in the call Joel Perez says, "He's saying we have to get rid of Lipuma. Oh, my God, got to get rid of him and then he'll get another lawyer he's got."

Then later in the call Joel Perez tells Marina Perez, "It doesn't mean we're going to do it, but how it work and what are his guarantees of it happening. Then you decide, and I'm not asking for you to decide."

We will play these calls in a moment. But all of this, combined with the fact that Marina Perez's testimony last week contradicted her own husband's plea agreement, as well as the evidence in the government's case, leads us to believe that Marina Perez provided false testimony last week.

MR. BRINDLEY: May I respond, your Honor?

THE COURT: Yes.

First, you have submitted a substantial written response --

MR. BRINDLEY: Yes, I have.

THE COURT: -- and I have read it.

MR. BRINDLEY: Okay.

THE COURT: But you nevertheless may argue. Go ahead.

MR. BRINDLEY: Thank you, your Honor.

First of all, there were conversations, as my written response indicates, that I had with Mrs. Perez. I'm totally entitled to speak to potential witnesses and she actually came to me and asked me certain legal questions, at which time I directed her to speak to Joel Perez's lawyer. She asked me for my opinion because I was in the case too, and I provided it.

What that opinion was was that Mr. Perez, based on the available evidence, would be found guilty at a trial. I believed that, the evidence shows that, and I told her that.

I also informed her that I did not believe it was fair or appropriate for my client to be convicted because of something her husband did. I made that very clear to her.

She did not like that. Because I believe the evidence and the witnesses, if called to testify, would be able to show that my client did not do this, while Joel Perez did. There was a hesitancy to proceed with those witnesses expressed by my client if Joel Perez was going to trial.

And there was some disagreement between the attorneys in this case about using certain witnesses who would present certain testimony that might be damaging to Mr. Perez and look like fingerpointing with two defendants. I discussed these issues with Mr. Perez's wife. And she was very unhappy with it. She didn't like it, and then she left.

And I have now -- last night I heard the calls the government is talking about. During those calls Mrs. Perez never indicates that I told her anything about what to say or not say or anything of the sort. That's outrageous and it's not true and it's not in the calls.

What she does is characterize my statements to her about what I believed about her husband's situation and his chances if he went to trial because she asked me for that. And when she characterizes as the government says, "Throw Joel under the bus," the truth would throw him under the bus as I understood it, and I told her that.

I told her I didn't care about Joel Perez. I represented Alexander Vasquez. That's why she should talk to Joel's lawyer. I made that very clear to her.

I also made clear to her I would follow the defense strategy if my client asked me to follow, but I believed the right thing to do was to establish truth, that this car belonged to and was driven by Joel Perez. And that in fact my client was not having any knowledge of this situation, because

I believed that based on my conversations with him and my knowledge of the case. She did not like that because it didn't have a good result for her husband.

She talked to me about certain questions she had about the sentencing. And I had talked to my client about certain issues related to sentencing.

The government references Joel Perez making comments about things that I said. I have never spoken to Joel Perez in my life one-on-one in any circumstance. I have never interviewed him. He is represented by Mr. Lipuma. There would be no reason for me to interview him and I have not.

I have certainly spoken to my client about various sentencing arguments that were possible, various pleas that were possible. And based on -- for him, for my client I am saying, those pleas. And based on those things, my client may have spoken to Mr. Perez, and it seems to me when I hear these calls that he and his wife were discussing what my client has expressed about what I said to him, none of which suggests anything about me telling this woman what to say which I never did. The implication is one that I resent.

The reality here is that what this amounts to is his wife coming to me and asking me questions, not liking the answer, and then giving an angry sort of ranting almost description what of I said that's both inaccurate, as it does not correctly represent what I said, and vague and meaningless

because -- you can hear it yourself. She makes it clear that she despises me. She insults my intelligence, the size of my office, my staff, my prices, everything. And all of that is contained in these calls the government seems to think are relevant.

And they are asking for a continuance apparently in order to present this information.

The biggest concern that I have, your Honor, is that we have jury here without an alternate who is ready to proceed. The government had a full opportunity to cross examine this witness, Marina Perez. There is no question about that. They had a full opportunity.

It's also no question that they knew she would be a witness before the trial began because, one, I told them. Two, in the paperwork, their paperwork, their discovery documents, and on the title form in specific, her name is listed so that they knew she was part of this case.

And I have good faith reason to believe, based on my interviews, that agents were attempting to interview her at some point prior to the trial. So they knew that her credibility would be at issue.

And because they wanted to listen to these calls to try to determine what she said, they had every opportunity to do that before she testified. If they wanted more time to decide how to cross examine her, they needed to ask for it

while she was under cross examination.

What they seem to want to do now is they want to get a redo on cross examination because apparently they were ill prepared and they want to apparently attempt to put in calls that will, I guess, be somehow impeaching. But the reality is those calls aren't impeaching at all because they do not have anything to do with the content of what she testified to here in court. There is nothing on the calls that the government has just referenced which I listened to last night with them which indicates that anything she said was false or is directly contradictory.

The statement about Mr. Vasquez -- Mr. Perez being present and so he is guilty -- she used other words, I'm saying guilty -- and then her saying, "Well, if that's true, then Alex is guilty because he was there."

She didn't dispute the fact that he was there. That's not contradictory. They have no real contradictory evidence. Instead, what they are trying to do is respond to a witness that apparently hurt their case by presenting recordings which ultimately amount to her characterization and second- and third-hand characterizations of what I said, all of which is obviously hearsay and creates a huge prejudicial effect problem because it puts me in a situation where I might have to testify in order to explain these conversations that were not about the events of August 5th, 2008 that she

discussed in her testimony.

I never interviewed her in detail regarding those events until August 20th. That I have distinctly written down in my records, in my notes. It was the 20th when I called her about what she recalled of the 5th. Before that I answered her questions about her husband's situation and questions she had about what defense I would present on behalf of my client.

And as a result of that, your Honor, nothing in these calls is relevant. It's going to be vague. It's going to be --

THE COURT: Let me state this. You certainly were on thin ice when you began to confer with her regarding the situation of her husband, Mr. Perez, knowing that Mr. Perez was represented by Mr. Lipuma. We'll put aside for the moment.

I'm only dealing here now with the government's motion to continue and there is enough of an argument to justify the granting of this motion.

What this suggests certainly is that Mrs. Perez had an interest, bias, or prejudice that should be the subject of additional testimony. The government is no longer required, nor is any party required to vouch for the veracity of a witness. The government can indeed call Mrs. Perez to impeach her credibility based upon prior inconsistent statements, and also should have an opportunity in light of this additional information once again to go into any interest, bias, or

prejudice that she may have.

In terms, however, of Alexander Vasquez, Jr.'s attorney's statements as she recounts them, which may be -- I'm speculating -- may be absolute lies, we will have to tread very gingerly, very carefully in that regard.

So if the government does intend to offer some statements made by Mrs. Perez over the telephone, the government should be careful in the distillation process to see what it is that they need to get in.

There is, of course, a 403 aspect to this kind of evidence. But the fact that it may be difficult to deal with doesn't therefore mean that the government can't bring to the attention of the jury that Mrs. Perez may have an interest, bias, or prejudice, that she may have committed perjury, that she may have been involved in collusion, at least that's the government's theory here somehow, or at least that she made statements on the witness stand which may be inconsistent with statements she made over the telephone when conversing with her husband who was at the MCC.

So all said and done, there is enough here to justify granting the continuance over objection.

In terms of how far the government can go with this, however, as I have said, we must deal with it very carefully. The government should approach this with an abundance of caution, because as defense counsel suggests here, Mrs. Perez

has made statements that are inaccurate or not true or may be distortions or just ranting, as the case may be.

And counsel for Mr. Vasquez has pointed out in the written objection other problems with permitting Mrs. Perez to go forward. But she will not go forward in an uncontrolled way. I will entertain objections as they occur during the course of her testimony. I'm instructing the government to be cautious as they prepare their questions to her. And, of course, you have told me that Mrs. Perez now has her own lawyer who may have something to say here. And indeed, at the edge of matters, there is Mr. Lipuma who represents Mr. Perez.

Now, the government may or may not decide to call Mr. Perez. That remains to be seen. I suppose Mr. Lipuma may have something to say about that.

By the way, Mr. Perez has yet to be sentenced, right?

MR. LEE: He has not been sentenced yet, your Honor.

THE COURT: He has not yet been sentenced. So there is an issue there.

MR. LEE: Yes, your Honor.

THE COURT: So I'm granting the motion to continue over objection.

Now, is it the government's position that you would be ready to go tomorrow with this at 10:00 o'clock?

MR. LEE: Yes, your Honor.

But there are a few related issues that we should

discuss with regards to that.

THE COURT: Well, first I want to get to the point where I can bring in the jury to tell them that I'm granting a motion to continue and when they would be ordered to return.

So when are you saying that you would be ready to proceed?

MR. LEE: We would -- before you proceed, we believe that certain issues need to be resolved.

We believe with regards to Mr. Brindley and the potential conflicts of interest issues that we referenced in our motion, we believe that Mr. Vasquez should make a knowing and full waiver as to any potential conflicts of interest that he may have with Mr. Brindley given the information on these calls.

We called the Federal Defender's office earlier and Mr. Bob Clark has been here on standby to assist Mr. Vasquez in that decision.

MR. CLARK: Good morning, your Honor.

THE COURT: Good morning.

MR. CLARK: May I approach? I don't have an appearance.

THE COURT: Well, just one minute.

I still want to get to the timing aspect of this. We have 12 jurors here and they must know when they are to return.

So can you be ready to go tomorrow morning --

MR. LEE: Yes, your Honor.

THE COURT: -- to present testimony?

MR. LEE: The government would be prepared to go forward tomorrow morning, yes.

THE COURT: Then I will send the jury home and be available during the course of the day to deal with matters. But I do want to let the jury know where they stand. We have already lost one juror. We have still, however, 12 remaining.

And so please ask the jury to come in. After the jury goes, we will call the case again.

MR. LEE: If I may, your Honor, with regard to scheduling.

One proposal the government would like to make with regards to Marina Perez is that out of an abundance of caution, one way to proceed may be to voir dire her before we put her on before the jury.

THE COURT: Well, I'm reluctant to tell her what she can or cannot do in the absence of her attorney. You have told me that she has now hired an attorney, and he should or she would have the right to be heard on this issues.

MR. MCINDLEY: Your Honor --

THE COURT: That attorney is en route?

MR. MCINDLEY: He will be available. I just talked to him on the phone. Mr. Piszetzky will be available today at 1:30, immediately after lunch. He is coming back from Joliet.

THE COURT: All right. Then that is one way to deal with this. After I send the jury home, we'll order all counsel and the defendant to return at 1:30 and we will pick it up one step at time. But the jury will be told to come back tomorrow at 10:00.

So please ask the jury to come in.

(Jury in.)

THE CLERK Court is in session. Please be seated.

THE COURT: Good morning, members of the jury.

THE JURY: Good morning.

THE COURT: There have been some unforeseen developments in this matter. I have just conducted a hearing for the last roughly half hour regarding this. The Court has determined that it will be necessary to continue this case until tomorrow morning at 10:00 o'clock.

I cannot go into the details of the reason for the continuance, and that may become apparent to you as the case goes forward. But as of now, I cannot go into the reason for this.

So I will ask then, and order that you return tomorrow at 10:00 o'clock, at which time we expect that a witness or witnesses will be called.

So the case is not yet over. You are excused for the day and you are to return tomorrow at 10:00 o'clock.

(Jury out.)

THE COURT: I noticed that all of the jurors have left the room.

I notice that Mr. Lipuma has arrived. And so I won't hold you any longer. Get about the business that you need get to and then return at 1:30 as I earlier indicated. Thank you.

MR. LEE: Thank you, your Honor.

MR. BRINDLEY: Thank you, your Honor.

(Proceedings recessed from 11:00 a.m. to 1:30 p.m.)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	08 CR 625
	)	
vs.	)	Chicago, Illinois
	)	August 31, 2009
ALEXANDER VASQUEZ,	)	1:30 p.m.
	)	
Defendant.	)	

VOLUME 4
TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE CHARLES R. NORGLE, SR.
AND A JURY

APPEARANCES:

For the Plaintiff:	OFFICE OF THE U.S. ATTORNEY 219 South Dearborn Street 5th Floor Chicago, Illinois 60604 BY: MR. STEPHEN CHAHN LEE MS. KRUTI TRIVEDI
For the Defendant:	LAW OFFICES OF BEAU B. BRINDLEY 53 West Jackson Boulevard Suite 1605 Chicago, Illinois 60604 BY: MR. BEAU B. BRINDLEY MS. BLAIR WESTOVER

APPEARANCES: (Continued)

For Mr. Joel Perez:	LAW OFFICE OF FRANCIS C. LIPUMA 300 South Wacker Drive Suite 1700A Chicago, Illinois 60606 BY: MR. FRANCIS C. LIPUMA
For Mrs. Marina Perez:	PISSETZKY & BERLINER LLC 53 West Jackson Boulevard Suite 1403 Chicago, Illinois 60604 BY: MR. GAL PISSETZKY
Stand-By Counsel:	LAW OFFICES OF ROBERT G. CLARKE 30 West Monroe Street Suite 710 Chicago, Illinois 60603 BY: MR. ROBERT G. CLARKE
Court Reporter:	MAELLEN E. PITTMAN Official Court Reporter 219 South Dearborn Street Room 2342 Chicago, Illinois 60604 (312) 435-5576

(Proceedings heard in open court. Jury out.)

THE COURT: 08 CR 625, United States versus Alexander Vasquez, Jr.

MR. CLARKE: Judge, may I approach too?

THE COURT: Yes. Certainly.

MR. CLARKE: For the record, my name is Robert Clarke.

I was called earlier this morning by the Federal Defender Office to come to this courtroom.

Obviously, I have been here for a couple of hours. If your Honor needs someone with respect to any issue that comes up as the evidence comes in, whatever that might be, I read the pleadings, and I'm not sure exactly where this is going to lead, but we're here, Judge, if someone needs any counsel with respect to a possible legal question that comes up with respect to the defendant and anyone else here.

I'm here to help if I can, Judge.

I would ask in the interim that I be appointed for the time I was here earlier, and will sit here through this as long as your Honor wishes me to sit it and listen to the evidence.

THE COURT: With an abundance of caution, you are appointed. Your availability is noted for the record.

And I did observe that you were here during the course of the morning, listening to everything that did occur

starting at about 10:00 o'clock, or so.

So you are appointed, and you can submit a CJA voucher routinely. I have notice also that Mr. Perez is available, and he is out in the hallway, I believe, and Mr. Lipuma is here as well.

MR. LIPUMA: Yes, your Honor. Frank Lipuma.

THE COURT: Did you see your client out here?

MR. LIPUMA: I did want to observe the court proceedings, and I will make no further contact with him.

I did speak with him this morning.

THE COURT: So the defendant and his two attorneys are here as well.

MR. BRINDLEY: Yes, your Honor.

MR. LEE: Yes, your Honor.

THE COURT: Where do matters stand from the government's standpoint?

MR. LEE: As we said earlier, your Honor, we think there are some issues that should be resolved before the trial can continue.

First of all, as Mr. Clarke just referred, to we think there is a potential conflict of interest that we believe Mr. Vasquez would need to make a full and knowing waiver of, and that's why we called the Federal Defender Office this morning, so if he would be available.

THE COURT: We must also be careful so as not to

interfere with the established relationship between Mr. Brindley and his client.

And so with an abundance of caution, however, given what has occurred here, I will address Mr. Vasquez.

So you are Alexander Vasquez, is that correct?

THE DEFENDANT: Yes, your Honor.

THE COURT: Please raise your right hand and be sworn.

(Defendant sworn.)

THE COURT: Did you hear everything that occurred this morning?

THE DEFENDANT: Yes, your Honor.

THE COURT: Have you had an opportunity to talk with Mr. Beau B. Brindley, your attorney, regarding these matters?

THE DEFENDANT: Yes, your Honor.

THE COURT: Is there anything that you want to say?

THE DEFENDANT: No, your Honor.

THE COURT: Have you had enough time to think about all of this?

THE DEFENDANT: Yes, your Honor.

THE COURT: Do you want to talk to another attorney before we go forward?

THE DEFENDANT: No, that's fine.

THE COURT: You heard what Mr. Clarke said?

THE DEFENDANT: Yes, your Honor.

THE COURT: The government has raised the issue that there is the possibility, if not more, of a conflict of interest that your client -- your attorney may face if this trial goes forward.

Are you aware of that?

THE DEFENDANT: Yes, your Honor.

THE COURT: Do you want to say anything about that?

THE DEFENDANT: No.

THE COURT: There is the possibility that Mr. Brindley could be called as a witness in this case, do you understand that?

THE DEFENDANT: Yes, your Honor.

THE COURT: Do you see any conflict of interest whatsoever as you view this case?

THE DEFENDANT: No.

THE COURT: You heard earlier this morning that the government intends to make an effort to offer in evidence portions of recorded conversations between Mr. and Mrs. Perez.

Do you understand that?

THE DEFENDANT: Yes, your Honor.

THE COURT: And do you also understand that apparently during the course of those conversations Mrs. Perez made statements about your attorney, Beau Brindley?

Are you aware of that?

THE DEFENDANT: Yes, your Honor.

THE COURT: Are you also aware that the government may seek to recall Mrs. Perez, and she may or may not testify in this case? Are you aware of that?

THE DEFENDANT: Yes, your Honor.

THE COURT: And that the government would be attempting to go into those conversations. Do you understand that?

THE DEFENDANT: Yes, your Honor.

THE COURT: And your lawyer's name might or might not come up.

Do you see any problem in terms --

THE DEFEDANT: I don't see no problem.

THE COURT: What is it that you want to do?

THE DEFENDANT: If he has got to testify, let him testify.

THE COURT: And you want him to remain as your lawyer?

THE DEFENDANT: Yes. I want him to be my lawyer, yes.

THE COURT: If there is a conflict in this case, are you saying that you would waive that issue; that is to say, give up that issue in the future?

THE DEFENDANT: What issue?

THE COURT: An issue that your attorney might have a conflict in terms of his continuing to represent you.

MR. BRINDLEY: I don't think he understands, your Honor. If you could rephrase.

THE COURT: You can confer with your client at the same time.

MR. BRINDLEY: Thank you, your Honor.

THE COURT: And also address him in the presence of the Court on this issue of waiver of conflict, or any potential conflict.

MR. BRINDLEY: And, your Honor, what I've asked Mr. Vasquez is the following:

If, during the course of the evidence coming in, it becomes the case that the nature of the conversations between Mr. and Mrs. Perez require me to be a potential witness or to give testimony in this case, whether he is willing to waive any future right to use that conflict after trial is over.

He has indicated to me that he does waive that conflict.

THE COURT: Is that correct?

THE DEFENDANT: Yes, your Honor.

THE COURT: Now, that may not be the extent of it. There may be more issues that could arise as this case goes forward.

So, once again, do you want Mr. Brindley to continue on as your lawyer?

THE DEFENDANT: Yes, your Honor.

THE COURT: Are you waiving any conflict that might arise as this case goes forward?

THE DEFENDANT: Yes.

THE COURT: Do you have any questions on anything that I have said?

THE DEFENDANT: No, your Honor.

THE COURT: Are you satisfied with his representation of you?

THE DEFENDANT: Yes.

THE COURT: Do you want to make any comment about his representation of you?

THE DEFENDANT: No, your Honor.

THE COURT: Now, I have to be careful because I don't want to interfere with your relationship with your lawyer. You have the right to be represented by an attorney of your choice. That's a constitutional right that you have.

Do you understand that?

THE DEFENDANT: Yes, your Honor.

THE COURT: By the same token, if you need, there is some potential for harm to you as the defendant in this case as a result of any problems your lawyer might have or that he may conceivably be called as a witness in this case, you can ask that he withdraw and hire a different attorney or ask the Court to appoint an attorney.

Have you thought about all of these matters?

THE DEFENDANT: Yes, your Honor.
THE COURT: What is it that you want to do?
THE DEFENDANT: I want to proceed with it.
THE COURT: Proceed with Mr. Brindley to be your lawyer?
THE DEFENDANT: Yes, your Honor.
MS. TRIVEDI: Your Honor, could we also ask the defendant about his understanding that Mr. Brindley would be cross examining witnesses, such as Marina Perez?
THE COURT: I think it's obvious to you, Mr. Vasquez, but I will return to this issue that Mr. Brindley will be asking questions of Mrs. Perez if she returns to the stand, and he will also be asking questions of Mr. Perez if he takes the stand.
Do you understand that?
THE DEFENDANT: Yes, your Honor.
THE COURT: That, once again, it may well be that Mr. Brindley may take the stand, and if he does, that he then would be cross examined.
Do you understand all of that?
THE DEFENDANT: Yes, your Honor.
THE COURT: Do you want to say anything?
THE DEFENDANT: No.
THE COURT: I want provide the opportunity for you to say anything you want to say.

THE DEFENDANT: That's fine.

THE COURT: Do you understand that if you say nothing further, that Mr. Brindley will remain as your lawyer in the case?

THE DEFENDANT: Yes, your Honor.

THE COURT: And that you will not be able in the future, should it become necessary or appropriate, to make any statement regarding conflict of interest in this matter?

Okay. So, once again, then, what do you want to do?

THE DEFENDANT: I want him to go -- go ahead with it.

THE COURT: Go ahead with whom?

THE DEFENDANT: I want him to keep being my attorney.

THE COURT: Who?

THE DEFENDANT: Mr. Beau Brindley.

THE COURT: All right. So he will remain as your attorney in this case.

MS. TRIVEDI: Counsel, we just -- perhaps this is again excessive or an overabundance of caution. Could we clarify that there is any question as to Mr. Vasquez's competency, or anything like that.

We have no reason to believe there is.

THE COURT: Do you have any reason in the world to think that Mr. Vasquez, who is standing right there, is not a competent person?

MS. TRIVEDI: None at all.

THE COURT: How is it that you raise the issue?

MS. TRIVEDI: We just want to make sure if he's waiving that, he is well aware of what he is doing.

THE COURT: What in your mind needs clarification?

MS. TRIVEDI: Based on what he said, if your Honor feels that's sufficient --

THE COURT: Is there something you know about his compentency that I don't know?

MS. TRIVEDI: No, your Honor. Just if Mr. Brindley has any questions about compentency.

THE COURT: You have raised the issue of the competence of Mr. Vasquez, and I'm saying is there anything to support the inquiry?

MS. TRIVEDI: No, your Honor. Other than to just make sure that the record is clear that he is competent, which I think it is.

THE COURT: Do you understand everything that is happening?

THE DEFENDANT: Yes, your Honor.

THE COURT: Are you clear-minded?

THE DEFENDANT: Yes.

THE COURT: Are you taking any drugs or chemicals?

THE DEFENDANT: No, sir.

THE COURT: Have you used any medication?

THE DEFENDANT: No, sir.

THE COURT: Have you had any alcoholic beverages to drink in the last 24 hours?

THE DEFENDANT: No, your Honor.

THE COURT: Are you clear-minded?

THE DEFENDANT: Clear-minded.

THE COURT: Are you being the pressured or threatened and in any way?

THE DEFENDANT: No, sir. No, sir.

THE COURT: Have you said the things that you have said because you want to say them?

THE DEFENDANT: Yes, your Honor.

THE COURT: Do you understand everything that has happened?

THE DEFENDANT: Yes.

THE COURT: Have you been talking to your attorney?

THE DEFENDANT: Yes.

THE COURT: Have you understood what he has said to you?

THE DEFENDANT: Yes.

THE COURT: As far as you know, has he understood what you have said to him?

THE DEFENDANT: Yes.

THE COURT: I think that's more than enough to make the point.

MS. TRIVEDI: Thank you, your Honor. I appreciate

it.

THE COURT: All right. What is the next issue?

MS. TRIVEDI: Your Honor, in addition, we have been discussing Miss Marina Perez.

Miss Perez is represented, as we noted earlier, by Gal Pissetzky. Mr. Pissetzky does not appear to have arrived.

THE COURT: He is not here. Then we will put that issue aside.

But as to Mr. Perez, you mentioned earlier that you might be calling Mr. Perez as a witness, is that right?

MR. LEE: Yes, your Honor.

THE COURT: Is it your intention to do that?

MR. LEE: We have not made any final decisions, but yes, we are currently considering calling him, depending how other aspects of our rebuttal case come in.

THE COURT: Well, as you know, he has the right to remain silent at this point.

MS. TRIVEDI: Your Honor, the government has a petition for an order granting immunity pursuant to Section 6002, Title 18 United States Code, to compel testimony at trial, as well as related paperwork.

I could pass that up to your deputy at this point.

THE COURT: All right. So please ask Mr. Perez to come in and we will deal with this issue.

MR. LEE: Thank you.

THE COURT: Mr. Vasquez may leave for a few minutes.

THE COURT: Counsel, will you ask Mr. Lipuma and Mr. Perez to come in.

MR. LEE: They are on their way.

THE COURT: All right. Thank you.

MR. LIPUMA: Good afternoon, your Honor.

Frank Lipuma, and with me is my client, Joel Perez.

THE COURT: Are you Joel Perez?

MR. PEREZ: Yes, sir.

THE COURT: Please raise your right hand and be sworn.

(Witness sworn.)

THE COURT: Mr. Lipuma, as you may well be aware, the government has informed the Court that they intend to call Mr. Perez -- Mr. Joel Perez -- as a witness in this case. And what is your client's position with respect to his being called as a witness?

MR. LIPUMA: Your Honor, we have received a trial subpoena for Mr. Perez's presence. I have not seen the order of immunity, although I have no doubt, because it's been represented to me by counsel from the government, that one has been secured by the Department of Justice.

I have had the opportunity this morning to confer with Mr. Perez about this, Judge, and I have explained to him the procedure that we are about to go through.

THE COURT: Mr. Joel Perez, the government has advised the Court that they wish to call you as a witness in this case. And the government has filed what is called a petition for an order granting immunity pursuant to Section 6002, Title 18, United States Code, to compel your testimony at trial.

I'm going to read this petition for the order into the record so that you can hear it. And then, if you need to, to discuss it with your attorney.

If I grant this petition, then an order of immunity will be issued by the Court. And I will about that in just a couple of minutes.

But, for the moment, this petition says that law enforcement agents have notified Frank Lipuma, the attorney representing Joel Perez, that Perez is needed to testify in this case.

The government expects that Perez, a co-defendant in this case, will testify that he committed criminal activity with Alexander Vasquez on August 4th, 2008, and August 5th, 2008.

More specifically, the government expects that Perez will testify consistent with his plea agreement that in early August 2008 he conspired with Vasquez an Co-Defendant Carlos Cruz to knowingly and intentionally possess with the intent to distribute a kilogram of cocaine.

Perez is expected to testify that he kept in contact with both Cruz and Vasquez in order to arrange for the drug deal in which Cruz would broker a kilogram of cocaine from his supplier to Perez and Vasquez.

Perez is also expected to testify that throughout the organization and implementation of the plan to get the kilogram, Vasquez was a knowing participant and came to the location of the intended drug deal with the money for the kilogram so that the deal could be completed.

Because Perez is discussing actions which are illegal and is expected to be asked on cross examination other questions that may elicit information about illegal activity, there is a legal basis for Perez to assert his privilege against self-incrimination under the Fifth Amendment to the United States Constitution in response to questions pertinent and material to the issues raised at trial.

This petition goes on to say:

It is my judgment, as United States Attorney for the Northern District of Illinois, that the testimony of Joel Perez in regard to the above-described trial is necessary to the public interest and, therefore, I have sought and obtained approval from designated representative of the Attorney General of the United States to make application to this Court that Joel Perez be instructed by the Court to testify in the trial of this matter in accordance with the terms and provisions of

Title 18, United States Code, Section 6002 and 6003.

A copy of a letter from the Assistant Attorney General of the Criminal Division, Department of Justice, setting out the above-mentioned approval is attached to this petition.

Wherefore, the petitioner prays the Court enter an order instructing Joel Perez to testify in the trial of this matter, subject to the provisions of 18 United States Code, 6002; that no testimony or other information compelled under the order or any information directly or indirectly derived from such testimony or other information may be used against him in any criminal case except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

And this petition is signed by an Assistant United States Attorney on behalf of Patrick Fitzgerald, the United States Attorney. The petition is signed by the two Assistants who are before the Court, Kruti Trivedi and Stephen Chahn Lee, Assistant United States Attorneys.

And that is the petition.

The letter from the Attorney at the Department of Justice is attached and it says: "Dear Mr. Fitzgerald:

"Pursuant to the authority vested in me by 18 United States Code, Section 6003 and 28 C.F.R. Section 0.175(a), I hereby approve your request for authority to apply to the

United States District Court for the Northern District of Illinois for an order pursuant to 18 U.S.C. Section 6002 and 6003 requiring Joel Perez to give testimony or provide other information in the above-matter, and in any further proceedings resulting therefrom or ancillary thereto," and is signed by an Lannie A. Breuer, B-r-e-u-e-r, Assistant Attorney General.

The petition appears to be in order. And, Mr. Lipuma having heard me read this, what is the position of your client?

MR. LIPUMA: Your Honor, it is our -- we have tried to impress upon the prosecutors in this case, Judge, what a difficult position this is for Mr. Perez. He pleaded guilty in this case because he was guilty, and we expected to proceed to sentencing from there, Judge.

His wife, apparently, Marina Perez, testified last week, and because of that it is my understanding that the government now thinks that Joel Perez needs to be a witness.

And what I have tried to impress upon the government, your Honor, is how difficult a position it would be for anybody to have to come to court and testify pursuant to an immunity order, when, in fact, it's not so much against the Co-Defendant on trial, in his heart or in his mind, as it may be how it would affect his wife, and how his testimony, as compelled as it is, would be contrary possibly to his wife's testimony.

And I think in his heart and in his mind he would not want to do anything to hurt his wife, as any loving spouse I

believe would do, Judge.

And the are hopeful that the government will reconsider and not call Mr. Perez as a witness in this trial.

And we are asserting our Fifth Amendment privilege against self-incrimination. And we understand the Court's position with the pleadings and prospective order it has in front of it, and if that order is signed and the government does call Mr. Perez as a witness, I don't know how he will respond it to, Judge.

Of course, it will be done with all -- personally, as a lawyer, with all due respect to the Court. But from our initial indications that I have had with Mr. Perez, he will refuse to testify.

And I apologize for saying that, but as an officer of the Court, that is Mr. Perez's stance, your Honor.

THE COURT: All right. The petition of the government for an order granting immunity is granted.

I will the sign the order, but I will read it as well.

This matter coming on to be heard on the petition of the United States of America, by Patrick J. Fitzgerald, United States Attorney for the Northern District of Illinois, for an order instructing Joel Perez to testify in the trial of this matter, said Joel Perez has a legal basis for asserting his privilege against self-incrimination during his trial

testimony;

And the Court, having considered said petition of the United States Attorney, and the letter approving the application to this Court from the Assistant Attorney General of the Criminal Division, United States Department of Justice, attached to said petition;

It is hereby ordered that Joel Perez shall not be excused from testifying in the trial of this matter on the ground that the testimony required of him may tend to incriminate him, and that Joel Perez shall proceed to the place of meeting of the trial and answer the questions which he is asked without further asserting there his privilege against self-incrimination;

And it is further ordered that no testimony of the witness, Joel Perez, compelled under this order or any information, directly or indirectly derived from such testimony, documents or other information, may be used against him in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with this order in accordance with the provisions of Section 6002, Title 18 United States Code.

And I am signing the order now.

All right. Mr. Vasquez, do you understand the nature of the order that I have just entered?

MR. LIPUMA: Perez, Judge.

THE COURT: Excuse me. Mr. Perez.

MR. PEREZ: Yes, your Honor.

THE COURT: Do you intend to comply with this order?

MR. LIPUMA: Judge, may I intervene for a second?

And, Judge, may I -- I think Mr. Lee indicated that the government hadn't made a final decision whether to call him or not. And I certainly would like another opportunity to speak with Mr. Perez and advise him of what this order really is all about, and that there is no -- and the consequences of refusing to comply with it, Judge.

THE COURT: All right. Certainly you should have the time to do that.

MR. LIPUMA: Thank you, Judge.

THE COURT: In the meanwhile, we are waiting for Mrs. Perez's lawyer.

MR. CLARKE: Mrs. Perez's lawyer is present.

THE COURT: And what is your name?

MR. PISSETZKY: Gil Pissetzky. G-i-l, P-i-s-s-e-t-z-k-y.

THE COURT: Is Mrs. Perez present?

MR. PISSETZKY: She is not present.

I talked to Mr. Lee. I was not positive if she has to be present or not. I could call her and have her come here. I don't know if they are still planning on calling her as a witness or not.

THE COURT: For now we will take a break so Mr. Lipuma can talk to his client.

And if you wish to talk Mrs. Perez's attorney, certainly you should have that opportunity.

MS. TRIVEDI: Thank you, your Honor.

THE COURT: But I have signed the order and given a copy of it to Mr. Fulbright to file.

All right. There will be a brief recess.

MR. LEE: Thank you, your Honor.

(Recess.)

MR. LEE: Good afternoon, your Honor.

Steve Lee for the United States, and Kruti Trivedi.

MR. LIPUMA: Frank Lipuma, your Honor, for Mr. Joel Perez.

THE COURT: Do you wish to make a statement this afternoon, Mr. Lipuma, on behalf of your client?

MR. LIPUMA: Judge, I just again spoke with Mr. Lee, and he again indicated that the government had not made a final decision as to whether they would call Mr. Perez as a witness.

And, Judge, if the Court would graciously allow us to wait until tomorrow to answer the Court's inquiry to the point after the government makes a decision on whether to call Mr. Perez?

THE COURT: All right. Very well.

But your client should be available. Where is he

presently residing?

MR. LIPUMA: He is at the MCC, Judge.

THE COURT: So he should be brought to the building. The jurors have been told to come back at 10:00 o'clock tomorrow.

And so he should be here, along with the defendant, ready to proceed.

But as for now, you are excused, counsel. Thank you.

MR. LIPUMA: Thank you, Judge.

THE COURT: Now, what happened to Mrs. Perez's attorney?

MR. PISSETZKY: He is here. I like to hide in the back, Judge. Good afternoon.

THE COURT: Have you been in touch with your client?

MR. PISSETZKY: I have, and she is on her way, Judge. I'm not sure for what purpose.

I understand from this morning's proceedings, your Honor, you have granted the government's request to recall her to the stand. I mean, I don't want to interpret.

THE COURT: I don't remember if the government made an absolute statement that they intended to do that.

Have you made an absolute statement that you are going to do that?

MR. LEE: We do intend call her in our rebuttal case, your Honor.

THE COURT: So the question then would be if she is called to the stand, what will she do?

MR. PISSETZKY: Well, here -- and I am supposed to go and listen -- I just got a preliminary draft of some phone conversations supposedly that my client had with I assume her husband.

That's my understanding.

I haven't had a chance, an opportunity to listen to those.

And based on the information I received from the government, these conversations have had something to do with her husband's trial.

Her position -- I haven't heard -- if they are -- and my understanding, again, your Honor, because I wasn't privy to the trial, is that she already testified on behalf of the defendant here, and the government cross examined her and they were done cross examining her, and actually the case is about to go into closing, if I'm not mistaken.

THE COURT: The defense rested.

MR. PISSETZKY: The defense rested.

THE COURT: And the government advised the Court that they were seriously considering putting on a rebuttal case.

So that the jury was told Thursday to come back Monday, today, at 10:00 o'clock, at which time we would determine whether there would be any rebuttal witnesses.

As it turned out, then, all of these issues arose. And that's where we are.

MR. PISSETZKY: Okay. My main concern, your Honor, is the government, based on briefly looking at these conversations, is intending to call my client to the stand for the sole purpose of impeaching her.

Now, I have no quarrel if they had done it during their cross examination. But now she is not under cross examination. She is their witness. And she is their witness to bring out new relevant issues in rebuttal for this case.

This conversation, which is hearsay embedded in hearsay, because not only is it a recording, it's also hearsay between individuals that are not here present in court, the government is trying to get them into evidence and --

THE COURT: Let me stop you there. You are not an attorney for the defendant in this case.

MR. PISSETZKY: I am not.

THE COURT: And are not in a position to make evidentiary objections.

MR. PISSETZKY: I'm not -- maybe it's the way I'm phrasing my objection.

My objection is if she is called simply to impeach her and to put her in a position where she will have to take the Fifth Amendment, then it is -- then she may have -- my advice to her would -- and, obviously, that's going to be

totally for her to determine, because it's her right and her personal right.

But if she is going to incriminate herself, she will most likely assert the Fifth Amendment.

I have been in contact with the government, and I'm trying to resolve the issue. And they know how they can resolve the issue, possibly, but I haven't received an answer from them.

THE COURT: Well, the first thing is this: You have told me that your client will be here, right?

MR. PISSETZKY: Correct.

THE COURT: And I am telling you that if she does not arrive, I have before me a motion for a warrant of arrest of your client as a material witness.

MR. PISSETZKY: Right. I have a copy.

THE COURT: So if she doesn't show up, we will return to this issue of whether the warrant should issue.

MR. PISSETZKY: I called her when Mr. Lee was next to me, and I spoke her when she was on the phone and she said she was leaving the house to come.

THE COURT: We shall see.

But for now, we will take a recess and see if she arrives.

MR. PISSETZKY: Thank you.

MS. TRIVEDI: Thank you, your Honor.

MR. LEE: Thank you, your Honor.

MR. PISSETZKY: Okay. Your Honor, so I can -- may -- I'd like to listen to the tapes.

MR. LEE: My estimate is it would probably take about 45 minutes to an hour from where she is.

THE COURT: I have other things to do in chambers, and will be working. When she arrives, let me know.

But in a reasonable time, if she does not arrive, then we will return to this issue of the warrant.

MR. PISSETZKY: Absolutely.

THE COURT: I'm accepting your representation that she will be here. But you're not committed to it. That's what she told you.

MR. PISSETZKY: Exactly.

THE COURT: All right.

MS. TRIVEDI: Thank you, Judge.

MR. LEE: Thank you, your Honor.

(Recess.)

THE COURT: Please call the case.

MR. CLAPPE: 08 CR 625, United States versus Alexander Vasquez, Jr.

MR. LEE: Good afternoon, your Honor.

Stephen Lee and Kruti Trivedi for the United States.

THE COURT: Good afternoon.

MR. BRINDLEY: Beau Brindley and Blair Westover on

behalf of Alex Vasquez, here, who is present.

THE COURT: Good afternoon.

MR. BRINDLEY: Good afternoon.

THE COURT: Is Mrs. Perez present?

MR. BRINDLEY: She is. She is speaking to her attorney, I believe, in the witness room.

THE COURT: Okay.

MS. TRIVEDI: The agent has just left.

THE COURT: All right.

MR. PISSETZKY: Your Honor, I'm looking for a garbage can so I can throw my gum out. I don't want to speak with my gum in.

THE COURT: You are asking a District Court Judge to help you find a garage can?

MR. PISSETZKY: I apologize.

THE COURT: I don't think it's funny. I think it's demeaning to the Court.

MR. PISSETZKY: I apologize. I was trying to be polite.

THE COURT: By asking the District Court where a trash can, is where to put your gum?

MR. PISSETZKY: I apologize. I meant no disrespect.

THE COURT: This is The United States District Court. You keep that in mind.

MR. PISSETZKY: Absolutely. That's why I was trying

to get rid of my gum, your Honor.

THE COURT: Where is your client? Would you ask her to come in.

MR. BRINDLEY: Your Honor, do you want Mr. Vasquez to remain standing for this?

THE COURT: No. He may be seated. He may be seated.

MR. BRINDLEY: Thank you.

(Pause.)

THE COURT: What is your name, please.

MRS. PEREZ: Marina Perez.

THE COURT: Would you please raise your right hand be sworn.

(Witness sworn.)

THE COURT: From the government's standpoint, what is the status of this issue?

MR. LEE: The government has called Marina Perez in its rebuttal case.

THE COURT: Tomorrow.

MR. LEE: Tomorrow, your Honor.

THE COURT: All right. What is the response of your client, counsel?

MR. LEE: Your Honor, I have had an opportunity to listen to the tapes, and I was in the process of explaining to my client outside here as to what was on the tapes.

And based on what I heard on the tapes here -- and

that's what I was just in the process of explaining to her -- is I don't see any issues in those tapes relating to her testimony a couple of days ago.

There is absolutely no discussion relating to --

THE COURT: My point is this: Does your client, if called to the witness stand, intend to answer the questions put to her by counsel?

MR. LEE: Well, my -- I did not have an opportunity to speak to counsel regarding what specific questions they are going to ask her, and I was wondering if they can make some kind of a proffer, because there is no -- at least to me or to the Court -- because there is nothing here referring to any testimony or any issues regarding her testifying at trial or adjusting her testimony a certain way or any type of discussions like that, whatsoever.

So I'm kind of at a loss at this time as to what do these tapes to have do with her testimony a couple of days ago.

THE COURT: Is your client going to be here tomorrow?

MR. PISSETZKY: If your Honor orders, she will, absolutely.

THE COURT: She is ordered to appear here.

And if Mrs. Perez were to tell me now that she would not be here tomorrow, I would order that she be detained until she would post a bond.

MR. LEE: No. She will be here, just like she came

here voluntarily today.

THE COURT: You will be here tomorrow morning?

MRS. PEREZ: If you order it, Judge.

THE COURT: I'm ordering that. Do you understand that?

MRS. PEREZ: Yes.

THE COURT: And if you fail to appear, the government has already presented a motion for the issuance of an arrest warrant.

So you are ordered to appear, and you have an obligation, if called to the witness stand, to take the stand.

Where matters go from there is another question.

But, in the first instance, you have an obligation to be here and to testify truthfully under oath, in the first instance.

So you're free to go on your statement that you will be here tomorrow morning at 10:00 o'clock.

MRS. PEREZ: I will.

THE COURT: You will be here?

MRS. PEREZ: Yes.

THE COURT: You will be here?

MRS. PEREZ: I will be here.

THE COURT: You will be here?

MRS. PEREZ: I will be here.

THE COURT: You'd better be here.

You are free to go now. You may leave.

MR. PISSETZKY: Thank you, your Honor.

THE COURT: Thank you, counsel.

MR. PISSETZKY: And I apologize again.

THE COURT: That's a closed issue.

MR. PISSETZKY: Thank you.

THE COURT: Thank you.

MR. CLARKE: Judge, may I approach before you?

THE COURT: Yes.

MR. CLARKE: Judge, I started earlier, and I guess I need not state again why I came here earlier today.

I wanted to address the Court and ask, since the Court ruled that the defendant -- that there did not seem, at least the Court ruled that the defendant waived issues with respect to conflict.

I just want to, on the record, ask the Court whether the Court or any of the parties wish to have a lawyer available in case any of the witnesses who will be called tomorrow may again resurrect that issue?

If they don't believe that that's going to happen, the issue being the issue of conflict, I won't return.

I don't think it's -- I think it's a waste, actually, for me to be here.

But if something does come up, I'm going to be a block away for the whole day tomorrow.

THE COURT: All right. Your statement is noted for the record.

Mrs. Perez, obviously, is represented by counsel.

Mr. Perez is represented by counsel.

And Mr. Vasquez is represented by counsel.

And we have two United States Attorneys.

Now, if for one reason or another the services of an additional attorney were required, Mr. Fulbright would be in touch with you immediately.

But, otherwise, you are excused and your presence here during the course of the day has been noted for the record.

MR. LEE: Thank you, Judge.

THE COURT: Thank you, counsel.

So the issue then is what happens tomorrow. And it appears that the jury will be here, and the first witness should be called at about 10:00 o'clock, as originally scheduled.

MR. LEE: Yes, your Honor.

THE COURT: Who then will be the first witness tomorrow?

MR. LEE: Marina Perez, your Honor.

THE COURT: Does it remain to be seen as to Mr. Perez?

MR. LEE: It does remain to be seen.

THE COURT: All right. I will hold you no longer. I think we have resolved all of the issues.

MR. LEE: There are just two brief issues, your Honor.

THE COURT: What are they?

MR. LEE: The government would make a motion for -- it's entitled to, under Rule 26.2, regarding any statements that defense counsel has regarding prior statements by Miss Perez and any other defense witnesses.

THE COURT: If you have such statements, counsel, in terms of mutual discovery, you should turn them over sometime before 10:00 o'clock tomorrow morning.

MR. BRINDLEY: I will do that, your Honor.

I do not have any such statements that I can think of right now. There are some attorney work product, but no statements.

THE COURT: Well, check your files.

MR. BRINDLEY: I will do that.

THE COURT: And comply with the rule.

MR. BRINDLEY: I will do that.

MR. LEE: And also, just for the record, I have, given how we are proceeding, I would provide Mr. Brindley with a CD of calls by Mr. Perez and Mrs. Perez.

THE COURT: Are those calls in Spanish?

MR. LEE: They are mostly in English. There are some

Spanish portions.

THE COURT: Now, as to the Spanish portions, have they been transcribed into English?

MR. LEE: We have only prepared the transcripts of a few calls, your Honor.

THE COURT: But to the extent that any conversations or portions of conversations are in Spanish, and if one side or the other intends to use them, they should be converted.

MR. LEE: Yes. If we plan on doing any other calls, we will, of course, prepare transcripts.

THE COURT: All right.

MR. BRINDLEY: I think for the record, your Honor, what counsel is suggesting is that he is providing all the calls on one disk for Mr. Perez, not just the ones they intend to use.

MR. LEE: Yes. Yes. Obligations under --

THE COURT: Brady.

MR. LEE: Yes.

THE COURT: If no other case.

All right. But to the extent that transcriptions are going to be used, one way or another they should be interpreted into English sometime overnight.

MR. LEE: Yes, your Honor.

THE COURT: Okay. Thank you, counsel.

MR. BRINDLEY: Thank you, your Honor.

(Proceedings adjourned at 4:00 p.m. to 10:00 a.m.)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	08 CR 625
	)	
vs.	)	Chicago, Illinois
	)	September 1, 2009
ALEXANDER VASQUEZ,	)	10:00 a.m.
	)	
Defendant.	)	

VOLUME 5
TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE CHARLES R. NORGLE, SR.
AND A JURY

APPEARANCES:

For the Plaintiff:	OFFICE OF THE U.S. ATTORNEY 219 South Dearborn Street 5th Floor Chicago, Illinois 60604 BY: MR. STEPHEN CHANN LEE MS. KRUTI TRIVEDI
For the Defendant:	LAW OFFICES OF BEAU B. BRINDLEY 53 West Jackson Boulevard Suite 1605 Chicago, Illinois 60604 BY: MR. BEAU B. BRINDLEY MS. BLAIR WESTOVER
Court Reporter:	MAELLEN E. PITTMAN Official Court Reporter 219 South Dearborn Street Room 2342 Chicago, Illinois 60604 (312) 435-5576

(Proceedings heard in open court. Jury out.)

THE COURT: Would you ask Mr. Vasquez to come in, please. I don't think he is here yet.

Call the criminal case.

THE CLERK: 08 CR 625. United States versus Alexander Vasquez, Jr.

THE COURT: Okay.

MR. LEE: Good morning, your Honor.

Stephen Lee and Kruti Trivedi for the United States.

MR. BRINDLEY: Good morning, your Honor.

Beau Brindley and Blair Westover on behalf of Alexander Vasquez.

THE COURT: Good morning.

I see that Mrs. Perez is also present with her counsel, is that right, counsel?

MR. PISSETZKY: Yes, Judge.

THE COURT: Your presence is noted for the record.

MR. PISSETZKY: Thank you, Judge.

MR. BRINDLEY: The defendant has not yet arrived, as you can see, your Honor.

THE COURT: Well, let's check the lock-up to see if he is there.

MR. BRINDLEY: The lock-up is locked, your Honor. I wish he was there too.

THE COURT: The lock-up should be locked.

MR. BRINDLEY: I suppose that's true.

THE COURT: All right. Well, please be seated for a few minutes. We need the defendant before we can proceed further here.

MR. BRINDLEY: Yes, your Honor.

MR. LEE: Yes, your Honor.

THE COURT: Just announce a short recess then, Eric.

THE CLERK: All rise. Court will take a brief recess.

The defendant just arrived.

THE COURT: We will take a recess.

(Recess.)

THE CLERK: Court will resume in session. Please be seated.

THE COURT: Please ask the defendant to come in.

(Defendant in.)

THE COURT: All right. Counsel, are there any issues that the Court should deal with before the jury comes in?

MR. BRINDLEY: I believe yes, your Honor, on behalf of Mr. Vasquez.

I believe, based on a letter that I received from the government, that you have received a copy of these transcripts?

THE COURT: Yes. I received it this morning and I have read them.

MR. BRINDLEY: Okay. In light of that, your Honor,

you will see that there are multiple places in here where we have a situation where apparently Joel Perez is -- first of all, your Honor, do you want me to go on with the witness present or should she be out of the courtroom? Just in caution --

THE COURT: I think it would be better to exclude the witness.

MR. BRINDLEY: Okay.

THE COURT: There was a previous motion to exclude witnesses, which I said at the time was a little late in coming, but granted that motion. So it remains in effect.

MR. PISSETZKY: Your Honor, may I stay in the courtroom?

THE COURT: Yes.

MR. PISSETZKY: Thank you.

MR. BRINDLEY: And what I was saying, your Honor, is that there is multiple times we have Joel Perez apparently recounting what Alexander Vasquez told him at the MCC about legal things and discussions I had had with Mr. Vasquez.

What we have there is deeply embedded hearsay, hearsay within hearsay before it gets to the recording. Because of that, your Honor, and for a second reason, the reliability of any such information is so low, because what we have is an MCC grapevine effect of trying to interpret apparent legal conversations that I had with Mr. Vasquez. The

reliability of anything that has gone through all of these layers of defendants who are incarcerated is very low.

THE COURT: But before you go on with your point, how much of either conversation does the government intend to offer?

MR. BRINDLEY: That would be very helpful, your Honor, for me to know as well.

MR. LEE: Yes, your Honor.

There are certain -- with respect to the August 1st call, the government was planning to use the part of the tape beginning at the bottom of page 2, the line that begins, "But Beau was trying to tell me that -- what Beau was trying to tell me is that you're fucked." Continuing through the beginning of page 5, where Perez says, "Don't worry about it."

Picking up again later, about halfway down the page, beginning with Perez saying, "I just can't explain to you how." And continuing to about halfway down page 6, stopping at Marina Perez saying, "I was looking at him like I wanted to smack the shit out of him."

And on page 7, beginning at the top of the page, going down to page 8, about halfway down, Marina saying, "And later he told me that it was his idea."

Oh, actually, no. I'm sorry. Let me strike this.

Actually, going to the last line on page 9, Marina Perez saying, "I told him that is fucking fucked up."

THE COURT: And for what purpose would these statements be offered?

MR. LEE: To go to the prior inconsistent statements with Marina Perez's testimony last week. They also go to impeach her, showing her bias, her motivation to lie. They will not be introduced for the truth of the matters asserted here.

MR. BRINDLEY: Your Honor, in order for them -- if they are trying to use -- first of all, she didn't give any testimony during direct or cross examination about any conversations she had with Mr. Perez or any consultation she had with me. The government didn't ask her any questions like that. As a result, I don't think there is any prior inconsistency in what we have just looked at here.

Moreover, on top of that, your Honor, if they are going to offer any of these things to try to suggest that she had some sort of bias for testifying, which seems to be the only reason they would, if they are going to do that, then they have to be offering them for their truth, otherwise they are not going to do them any good. As a result, I think it's disingenuous to some extent to claim that these aren't offered for their truth.

Besides that, I think we still have the problem with how they are going to elicit these statements. They can't simply ask her, did I tell her various things. Obviously, that

would be inappropriate. And they can't call her for the simple purpose of getting inconsistent statements. They can't do that as the rules clearly state. If the only reason for calling her is to elicit prior statements that would have been otherwise inadmissible in their case in chief, that's inappropriate too. So I just don't know the mechanism how they think that they can admit these statements.

THE COURT: Well, the prior inconsistent statements would not go in for their truth, they are not under oath, but would go to her credibility. That the jury would know that on one occasion she said one thing and on another occasion she said another.

With respect to interest, bias, and prejudice, on the other hand, if any of these statements can be interpreted as such to indicate an interest, bias, or prejudice, they would go in for their truth.

The clearest example would be I'm going to make a statement to try to help Vasquez, or I'm going to try to make a statement to harm Vasquez, or I love Vasquez. We could go on here.

All right. So they are admissible in that sense. If there is enough of an inconsistency here, the Court should then let them go to the jury and the jury would apply appropriate weight.

There is enough of a showing -- it's not a high

level, obviously -- that the Court determines in the first instance whether there is enough to permit this to go to the jury. I would make that finding that there is enough of a showing in light of the testimony of Mrs. Perez on the witness stand last Thursday.

So selectively then these statements would be admissible for the purposes I have indicated, and that is with respect to the conversation on August 1st.

Now, there is a second conversation on August 5th, and as to that conversation --

MR. LEE: Yes, your Honor.

THE COURT: -- what is the government's position as to what should go in? And then we will get to the 12th.

MR. LEE: Yes, your Honor.

Starting on the second page of that transcript, the one that's labeled at the bottom page 11. Starting about halfway down the page with the line, Marina Perez saying, "You're telling me don't worry."

And continuing to toward the top of the next page, stopping with Marina Perez saying, "Trying to make me say well, fine, argue whatever you want to argue. I'm going to tell Alex to let you argue whatever you want to argue."

THE COURT: And what is the inference to draw?

MR. LEE: Similar to the first one, your Honor. There is a prior inconsistent statement with Marina Perez

saying on August 5th that everybody, meaning both Alexander Vasquez and Joel Perez, were in the shithole. Meaning that they were both similar situated, which is inconsistent with her testimony last week that Alexander Vasquez was just there in Arlington Heights by happenstance.

There is also again, as with the first call, statements going to her interest, bias, and prejudice regarding her discussions about letting -- letting you argue whatever you want to argue.

THE COURT: What is your response, counsel?

MR. BRINDLEY: First of all, with respect to this "argue whatever you want to argue," I have no idea what that means. I think it's so vague that -- I mean, I don't know what it means and what prior inconsistency it could show or what bias it could show. I have no idea what it means.

As was the case with most of this, the things that she is saying are hard to interpret, period. I guess they can ask her what they mean.

The bottom line here there is not enough here in my view to create any inconsistency with what he said the other day. She doesn't say anything about where Mr. Vasquez was or whether -- nothing like that. What she is saying here is if it's the case that just because you are there, then everybody is in trouble, to paraphrase. And then she says, "Alex would be in trouble too." You know, I don't know how that's

inconsistent with what she said. She said Alex went there. He was there. So I don't see any inconsistency here.

I also take issue with the claim that if they are saying that they are offering this for bias or prejudice and then they are going to offer it for its truth, at that point it is hearsay, and I don't see how it can come in for its truth because it's an out-of-court statement offered to prove the truth in that instance.

So those times where they are claiming bias and prejudice is appropriate, they can't get it in under the hearsay rules.

THE COURT: If the statements are offered to show interest, bias, or prejudice, then they go in for their truth. If the statements are offered as prior inconsistent statements, the earlier statement is not offered for its truth, but it is that the jury can take into account the earlier statement in judging the credibility of the witness with respect to the latter, which is to say, the jury should know that at some point the witness says one thing and at another time she says another.

Now, it doesn't have to be black and white. It doesn't have to be that sharp a contrast in order to qualify as a prior inconsistent statement. There is a tendency here with respect to inconsistency. And it is wrapped up, as it were, with the statements that go to interest, bias, or prejudice.

So the objections to portions the conversation of August 5th are overruled, which takes us to the conversations of August 12th.

MR. LEE: Yes, your Honor.

For that the government would plan to begin at the bottom of the first page of the transcript, that's labeled page 13, beginning Marina Perez saying, "Anything else you can tell me about that meeting."

And continuing to the top of page 16 with Marina Perez saying, "Well, I already know what the answer is to our issue. I will go see Beau. After I hear, after I hear those tapes, then I will go see Beau. He was trying to make it difficult because I don't go there in the mornings. If that's the only time he has got, that's the time I'll see him."

Picking up again later down that same page with Marina Perez saying, "So he wants to talk. He is going to talk about you."

And continuing to page 17, about halfway through where Marina Perez says "Yeah."

THE COURT: So what is the inference to draw?

MR. LEE: Again, this goes to more -- clearly to the interest, bias, and prejudice of the witness. In this -- in the portions of these calls here she is talking to her husband about her understanding of certain things the defendant's attorney will do for her husband in terms of making certain

sentencing motions that the husband's own lawyer either doesn't agree with or doesn't want to make.

So that goes to her bias in saying what she did and it goes to her interest.

MR. BRINDLEY: Your Honor, if I can respond to that.

The problem here is it's not her talking, it's him. It's Mr. Perez talking about what Mr. Vasquez said that I said throughout most of this. And certainly, that's not going to be appropriate to allow that in because the reliability of any such information after it has gone through two defendants at the MCC are far from legal counsel to somebody else. The indicia of reliability is so low that it would certainly be more prejudicial than it would be probative.

THE COURT: The statement of Joel Perez as context to the statements of Marina Perez, his spouse, in order to understand what she is saying and to draw appropriate inferences, one needs to know what Joel Perez is saying or not saying. It's a matter of context.

And also chronology here, because following these conversations Marina then acts subsequently and eventually ends up on the witness stand giving her version of what happened in the apartment.

So this does go to the state of mind, the interest, bias, or prejudice that Marina Perez may have had at the time she uttered these words.

Another inference is that her concern may have been less than the truth of what occurred as opposed to a version of what her testimony might later be; that she is somehow working on it, so to speak.

But ultimately it will be for the jury to determine what inferences to draw from these statements in terms of her interest, bias, and prejudice as well as inconsistencies in what she says here in this conversation as opposed to what she said last Thursday.

So portions of the August 12th conversation will also go in.

MR. BRINDLEY: Your Honor, in light of the Court's ruling on that issue in terms of portions of the government wishes to play, at this point to fully contextualize all of these portions the government has suggested pursuant to the rule of completeness, the defendant will ask that the entire recordings be played.

THE COURT: Is there any objection?

MR. LEE: No, your Honor.

THE COURT: All right. So we are dealing with Rule 106.

MR. BRINDLEY: Yes.

THE COURT: A recorded statement, and this will complete the conversation and give the jury a better and more comprehensive view and understanding of the words that were

being spoken.

MR. LEE: Your Honor, if I may add, I'm sorry, I should have thought of this a second ago.

There are some portions of the conversation that are actually of a personal nature between Joel Perez and his wife. I think there is some talk with their son --

THE COURT: Well, the defense counsel wants them in. Are you saying you want don't want them in?

MR. LEE: I just wanted to raise the issue.

THE COURT: So you do not want them all to go in?

MR. LEE: I think that --

THE COURT: There is no privacy issue here.

MR. LEE: Yes, your Honor.

THE COURT: First, this is recorded conversations with the warning at the MCC.

MR. LEE: Yes, your Honor.

THE COURT: That says if you speak here, understand that you are waiving privacy rights or words to that effect.

MR. LEE: Yes, your Honor. We just wanted to make clear that we are not seeking to embarrass anyone.

THE COURT: The objective here is certainly not embarrassment.

MR. LEE: No.

MR. BRINDLEY: I just want to make sure the jury has the full contents.

THE COURT: The embarrassment may even go to interest, bias or prejudice, but that's not the issue.

MR. LEE: Yes, your Honor. Then that's fine. The government is fine with playing the entire tape.

THE COURT: So the defense has moved for the entirety to go in. The government has withdrawn any objection it may have had. So I have said the entire conversations will go in.

MR. LEE: There is one more call, your Honor.

THE COURT: Yes.

MR. LEE: If I can hand up a copy of the transcript which was prepared earlier this morning. This is a call -- at the end of the August 12th call, there is a reference to Marina Perez going on and talking to Mr. Brindley.

THE COURT: This is a conversation of August 13th.

MR. LEE: And then the August 13th conversation follows up on that.

THE COURT: What is it that you want to offer in terms of August 13th? Again, the entirety?

MR. LEE: Yes, your Honor.

THE COURT: Do you have any objection to the entirety, Mr. Brindley?

MR. BRINDLEY: No, play the entirety, yes. I don't have an objection. Well, I have -- let me rephrase it, your Honor.

If your Honor is going to make the same ruling you

made on -- I make the same objection that there is no inconsistency and it doesn't go to bias, first of all.

THE COURT: The objections are overruled for the reasons I earlier indicated.

And if your follow-up then is to move that the entirety of the August 13th conversation go in, the Court will allow it to go in to the jury in its entirety.

MR. BRINDLEY: Yes. That is my request in light of the Court's ruling.

THE COURT: Okay. Is the next witness then Mrs. Perez?

MR. LEE: Yes, your Honor.

MR. BRINDLEY: One more issue with respect to Mrs. Perez, your Honor, and I don't know if her attorney wants to comment on this or not. But I don't know what the government is going to ask her, but in addition to these recorded conversations, there are certainly situations I'm sure in which Mrs. Perez has met with her husband during personal visits at the MCC in the visiting room.

And, your Honor, when that happens, those would not be conversations like these recorded ones in which any claim of marital privilege would be waived. So any statements made between Joel Perez and Marina Perez during visits at the MCC are in my view inadmissible pursuant to the marital privilege unless they can get a waiver from both parties.

So I want to make that clear before we start asking her questions.

THE COURT: Do you -- Mr. Lee, do you intend to go into any conversations at the MCC other than those that were recorded?

MR. LEE: At this time, no, your Honor.

THE COURT: All right. So there is no issue.

MR. BRINDLEY: Okay.

THE COURT: And whether there would be any exceptions to the marital privilege would be determined by the Court after a more complete hearing on the issue.

But since the government, at least at this point, does not intend to go into any unrecorded statements, the issue is moot.

All right. So after Mrs. Perez testifies, is it your intention then to call Joel Perez or have you yet to make that decision?

MR. LEE: We have yet to make that particular decision, your Honor.

THE COURT: All right. Then we won't waste any time. The jurors are all here.

Ask Mrs. Perez to come in and I will tell the marshal to bring in the jury and we will go forward.

MR. LEE: Thank you, your Honor.

MR. PISSETZKY: Your Honor, should she take the

witness stand?

THE COURT: Yes, please.

(Jury in.)

THE CLERK: Court is in session. Please be seated.

THE COURT: Good morning, members of the jury.

THE JURY: Good morning.

THE COURT: Good morning, members of the jury.

THE JURY: Good morning.

MR. LEE: The government calls Marina Perez.

THE COURT: Do you recall that you are still under oath?

THE WITNESS: Yes.

THE COURT: You may be seated.

MARINA PEREZ, GOVERNMENT'S WITNESS, PREVIOUSLY SWORN

DIRECT EXAMINATION

BY MR. LEE:

Q. Last week you told us that the defendant's attorney interviewed you prior to your testimony in this case, didn't you?

A. I testified that I met with him, yes.

Q. And you told us that -- you used the word -- and you told us that that was on August 20th, didn't you?

MR. BRINDLEY: Objection. Leading.

THE COURT: Overruled.

You may answer.

BY MR. LEE:

Q. And August the --

THE COURT: You may answer the question.

BY THE WITNESS:

A. Did I meet with him August 20th? That's the question? Yes.

BY MR. LEE:

Q. That was the question.

You told us that the meeting was on August 20th, right?

A. Yes.

Q. And August 20th was not the only time that you met with the defendant's attorney, was it?

A. No, it wasn't the only time I have seen him, no.

Q. August 20th wasn't the only time you met with the defendant's attorney, was it?

A. August 20th was not the only time, no.

Q. You actually met with the defense attorney about a month ago on August 1st, didn't you?

A. I don't recall if August 1st is the correct date, no. But I have met with him before.

Q. You met with the defendant's attorney about a month ago, didn't you?

A. Yes.

Q. And you sat down with the defendant's attorney here in

Chicago, didn't you?

A. Yes.

Q. And afterwards, you told your husband about your meeting with the defendant's attorney, didn't you?

MR. BRINDLEY: Objection. Leading.

THE COURT: Overruled.

You may answer.

BY MR. LEE:

Q. And this was by telephone, wasn't it?

A. Yes.

Q. And this was on or about August 1st?

THE COURT: Let me clarify a point at a side bar.

MR. BRINDLEY: Thank you, your Honor.

(Proceedings heard at side bar.)

THE COURT: Because this witness is so adverse to the government's position, and the government may ask leading questions. And so I thought you might be making more objections, "leading" and I'm -- I didn't want to rule every time.

MR. BRINDLEY: Are you making a finding that this is hostile witness situation, your Honor?

THE COURT: The interest under the Federal Rules of Evidence, the interest of this witness are opposed to the government and aligned with the defendant. There is enough of a showing, in that sense, adversity, that her interests are

adverse to the government and aligned with others.

MR. BRINDLEY: Okay.

THE COURT: That being the case, the government can ask leading questions.

MR. BRINDLEY: So, your Honor, to avoid further objections, can I just have an objection for the record to the leading questions?

I guess I should have made the request before, your Honor. I apologize.

THE COURT: Okay.

(Proceedings heard in open court:)

THE COURT: You may proceed.

MR. LEE: Thank you, your Honor.

BY MR. LEE:

Q. In this meeting with the defense attorney, this was on or about August 1st, right?

A. I'm not sure what day exactly it was, because it was not my meeting. I was simply going along with the defendant's wife. And since we go and visit together, we just went together. And it was not like a formal meeting that has to do with anything about testifying at all.

MR. LEE: Your Honor, may the record reflect the witness's answer as nonresponsive.

THE COURT: Members of the jury, disregard the answer of the witness.

Please read the question back to the witness.

(Question read.)

BY THE WITNESS:

A. I'm not sure what date it was.

BY MR. LEE:

Q. And your husband was in prison at the time, wasn't he?

A. Yes.

Q. And you told your husband that you talked with the defendant's attorney about this case, didn't you?

A. About his case, yes.

Q. And this call with your husband, you said I'm like what. Alex came too. Joel is so much fucked, and so is he, didn't you?

A. Yes, I did.

Q. Now, you talked to your husband a few days later about the defense attorney, didn't you?

A. Yes.

Q. This was on or about August 5th, right?

A. I guess so.

Q. And this is by telephone, wasn't it?

A. Yes.

Q. And you said that the defendant attorney was saying that everybody was going to lose, didn't you?

A. No. The defense attorney was telling me that my husband was --

Q. It's a simple question.

And you said that the defense attorney was saying that everybody was going to lose, didn't you?

A. That my husband was fucked. That that was what I remember, yes.

Q. And you said that the defense attorney was saying that everybody was going to lose, didn't you?

A. I don't remember that. I just remember worrying about my husband. I don't recall everybody was going to lose. I remember that my husband would lose.

Q. And in this call you told your husband that you thought that everyone is in the shit hole, didn't you?

A. Well, if that's what's on it, I guess so. I don't recall all these conversations.

Q. You also talked to your husband about the defendant's attorney on August 12th, didn't you?

A. Yes.

Q. And your husband talked about what he thought the defense attorney could do for your husband, didn't you -- didn't he?

A. Would you repeat that again.

Q. And your husband talked in this call about what he thought the defense attorney could do for your husband?

A. Not what he could do for my husband. We were expecting the lawyers to work together to -- to help each other for, you know, to help each other out. Not what he would do for my

husband, no.
Q. And your husband said that he thought that the defendant's attorney could get your husband a lower sentence than your husband's actual lawyer, isn't that right?
A. Can you repeat that again.
A. And your husband told you in this call that he thought that the defendant's attorney could get your husband a lower sentence than your husband's actual lawyer could, isn't that right?
A. Well, that's -- no. He was saying that he had ideas that would help Frank, his lawyer. Ideas that Frank did not have on his own as to helping him with, you know, ideas towards the sentencing.
Q. And your husband said that he thought the defense attorney could make some motions on behalf of your husband, isn't that right?
A. Not that he would make motions on behalf. But simply just to help his -- his lawyer with ideas for sentencing. That's it. Not that he would personally put motions in, no.
Q. And your husband said that he thought the defense attorney was guaranteeing a lower sentence for your husband, isn't that right?
A. No, that's not right.
Q. Your husband said that he thought the defense attorney could get your husband a sentence of about three or four years,

isn't that right?
A. That the defense attorney could get my husband a sentence is that what you are asking me?
Q. And your husband said that he thought that the defendant's attorney could get him -- could get your husband about three or four years, isn't that right?
A. His idea, what would possibly -- yes, to a lower sentence, but not him personally getting him a lower sentence. I don't understand.
Q. At three to four years, that's a lot less time than the sentence you thought that your husband was going to get, isn't it?
A. Is it less than what I thought because he -- he just pleaded guilty. We didn't even know he was going to trial or not.
Q. And three or four years is a lot less time than the sentence you thought your husband was going to get, isn't it?
A. Yeah. I wasn't really sure of what kind of sentence he would get, so --
Q. And after you had this conversation with your husband on August 12th, you did call the defendant's attorney, didn't you?
A. Can you repeat that? After my conversation?
Q. And after you had this conversation on August 12th with your husband, you did call the defendant's attorney, didn't you?

A. I don't remember calling him right after that conversation, no. I don't remember.
Q. And at some time after you had this conversation with your husband --
A. Um-hum.
Q. -- did you -- you did call the defendant's attorney, didn't you?
A. After I spoke with my husband on the phone, when he called me from the MCC, that I right away called both, is that what you are asking me?
Q. Mrs. Perez, and at some time after you had this conversation with your husband on August 12th, you did call the defendant's attorney, didn't you?
A. I don't remember calling him right after that on August 12th.
Q. I didn't ask you if you called him right after. I asked you if you called him at some time after your conversation with your husband on August 12th.
A. Well, yes, I did call him after, yes.
Q. Thank you.
And after talking to the defendant's attorney, you talked to your husband by telephone, didn't you?
A. Yes.
Q. And you told your husband that you thought that the defendant's attorney could get your husband a lower sentence,

didn't you?
A. Yes. I thought his ideas could possibly help my husband, sure.
Q. And you told your husband that you understood that the defendant's attorney was saying -- strike that.
And you told your husband that you thought that your husband had to be careful about how he pled guilty, didn't you?
A. Yes. He is my main concern, yes.
Q. And that was because you thought that the government would want your husband to admit the role of Alexander Vasquez in your husband's crime, didn't you? Isn't that right?
A. Can you repeat that again?
Q. And you thought that your husband had to be be careful about how he pled guilty because you thought that the government would want your husband to admit Alexander Vasquez's role in your husband's crime, is that right?
A. I wanted him to be careful because I wanted him to have as low a time as possible.
Q. And you thought that the defendant's attorney was recommending that your husband enter a plea where he did not admit the role of Alexander Vasquez, isn't that right?
A. Where he did not admit, yes, because he is going to trial.
Q. Mrs. Perez, you told the jury last week that you did not agree to come to court voluntarily, didn't you?

A. Yes. And that was the truth.
Q. You told the jurors that you received a subpoena from the defendant's attorneys, didn't you?
A. Yes.
Q. And you accepted that subpoena, didn't you?
A. Yes.
Q. And this subpoena was from the defendant's attorney, wasn't it?
A. Yes.
Q. And you had already met the defendant's attorney on several occasions by this time, isn't that right?
A. By "several," what do you mean? A lot of times, no, not a lot. But, yes, I have seen him, yes.
Q. And by that point you had already met the defense attorney on several occasions?
A. Yes.
Q. Isn't that right?
A. Yes. Because I did not want to come and testify. And then I got subpoenaed.
Q. And that was why you appeared last week, right?
A. Right.
Q. Now, you do not -- you did not want to be here today, did you?
A. No. Nor the other day.
Q. And you know that the government tried to serve you with

a subpoena on Sunday, don't you?
A. No, I did not know that the government was trying to serve me a subpoena on Sunday, no, I did not. I did not know until I later contacted a lawyer and he later then told me that they were trying to subpoena me.
Q. You knew on Sunday that the government was trying to serve you with a subpoena, didn't you, don't you, didn't you? Excuse me.
A. No, no, I did not know what was going on.
Q. At some point on Sunday you knew that the government was trying to serve you with a subpoena, didn't you?
A. Not until the next morning.
Q. And you refused to accept the government's subpoena, didn't you?
A. I didn't refuse anything.
Q. But you didn't refuse to accept the subpoena from the defendant's attorney, did you?
A. It was brought to me surprisingly. They came knocking at my door at 2:00 in the morning.
MR. LEE: Your Honor, may we strike that nonresponsive answer?
THE COURT: Disregard the last answer.
Rephrase the question.
BY MR. LEE:
Q. You did not refuse to accept a subpoena from the

defendant's attorney, did you?

A. I never refused any subpoena.

MR. LEE: May I have a moment, your Honor?

THE COURT: Yes.

MR. LEE: Nothing further at this time, your Honor.

THE COURT: Do you have any questions, counsel?

MR. BRINDLEY: Yes.

CROSS EXAMINATION

BY MR. BRINDLEY:

Q. Mrs. Perez, let's begin by talking about what happened on Sunday. On Sunday you were at home at some point, correct?

A. Um-hum, yes.

Q. And around various times throughout the day on Sunday you experienced people beating on your doors and your windows, correct?

A. Yes, I did.

Q. Okay. And you indicated that they did that as late as 2:00 o'clock in the morning?

A. 2:00 o'clock in the morning, 4:00 o'clock, 6:00 o'clock in the morning.

Q. Okay. And when these -- were these law enforcement people or did you know for sure who it was?

A. I didn't know who it was because they were in regular clothes.

Q. Okay. And did you know exactly what was going on for

sure?
A. No, I didn't. They wouldn't even say anything.
Q. Now, did you -- you said you contacted a lawyer, is that right?
A. Yes.
Q. And was it the lawyer that then ultimately explained to you what was going on?
MR. LEE: Objection, your Honor.
THE COURT: Overruled.
You may answer.
BY MR. BRINDLEY:
Q. Was it the lawyer who explained to you what was going on?
A. Yes. Then the lawyer, yes.
Q. Now, we just talked about how the government was trying to serve their subpoena on Sunday.
Now, the subpoena that was served on you by my office, I didn't have it served by a law enforcement officer, did I?
A. No, you didn't.
Q. What I did was I got your nextdoor neighbor and your good friend to serve it on you when you wouldn't expect it, is that right?
A. Yes.
Q. And you didn't appreciate that very much, did you?
A. No.

Q. Now, I want to talk to you about the meetings that we had at my office.

When you came to my office in early August, you said that you came in with Mrs. Vasquez, the mother of some of his children, his fiance, we say, right?

MR. LEE: Objection, your Honor.

THE COURT: Overruled.

You may answer.

BY THE WITNESS:

A. Yes.

BY MR. BRINDLEY:

Q. And when you came in you met with me and you asked me some questions about your husband's case, didn't you?

A. Yes.

Q. And I made it clear to you on that day that the only person I represented was Alexander Vasquez, didn't I?

A. Yes.

Q. And I told you that you should speak to your husband's lawyer if you want to know about his case, didn't I?

A. Yes.

Q. And you indicated to me well, I did talk to him but I want to know from you what you're doing, right?

A. I just wanted to know a second opinion.

Q. Okay. And then when you asked me for that I was willing to give you my opinion of your husband's case, didn't I?

A. Yes.
Q. Okay. Now, what I told you on that day, Mrs. Perez, that I talked to you is I told you that I believed that the facts in this case absolutely established your husband's guilt, didn't I?
A. Yes.
Q. And when I told you that you did not like it at all, did you?
A. No, I didn't.
MR. LEE: Objection, your Honor.
THE COURT: The answer may stand.
BY MR. BRINDLEY:
Q. You got angry when I told you that, right?
A. Very.
MR. LEE: Objection, your Honor.
Brief side bar?
THE COURT: Yes.
(Proceedings heard at side bar:)
THE COURT: What is the objection?
MR. LEE: First of all, Mr. Brindley is basically testifying in the court to these questions.
THE COURT: He has put himself in the trial.
MR. LEE: Yes. And that creates certain issues.
THE COURT: Yes, it does.
MR. LEE: So, well, based on that --

MS. TRIVEDI: Your Honor, we were very careful during the direct --

THE COURT: You brought up the fact that the witness had gone to see Mr. Brindley on numerous occasions, and he has now returned to the issue in terms of what they discussed to defeat, I assume, any negative inferences that the jury might draw from her answers that -- to your questions.

But in the process of doing so, Mr. Brindley has said: I said this, I did this, and he has certainly injected himself into the trial.

MR. BRINDLEY: Your Honor, this is one of the issues we dealt with yesterday with Mr. Vasquez.

THE COURT: Well, you have -- I'll say again -- you have put yourself into the trial.

There is no other issue I'm being asked to deal with at the moment. But you have gone into conversations you had with the witness to contradict the inferences the government would be asking --

MR. BRINDLEY: Yes.

THE COURT: -- the jury to draw --

MR. BRINDLEY: Yes.

THE COURT: -- from her conversing with you on numerous occasions.

MR. BRINDLEY: Yes.

THE COURT: So to a certain extent you can go on with

that.

MR. BRINDLEY: Thank you, your Honor.

THE COURT: But, once again, you have, therefore, injected yourself into this trial.

MR. BRINDLEY: Very well, your Honor

MR. LEE: Your Honor, also this witness -- I don't believe this witness is hostile towards the defendant.

MR. BRINDLEY: This is cross examination.

MR. LEE: So especially given the nature of this line of questioning, I think it would be more appropriate to use open-ended questions.

MR. BRINDLEY: That is cross examination.

THE COURT: This is in the nature of cross examination. But, in any event, this witness is hostile to everyone.

MR. BRINDLEY: I agree with you, Judge.

THE COURT: She says that she did not want to be here in terms of the subpoena issued by defendant. She certainly did or does not want to be here in terms of being called by subpoena or otherwise by the government.

She does not like being here whatsoever. She is adverse to everyone. And so either side can proceed by way of cross examination.

MR. BRINDLEY: Thank you, your Honor.

(Proceedings heard in open court.)

MR. BRINDLEY: May I proceed, your Honor?

THE COURT: Yes.

BY MR. BRINDLEY:

Q. Miss Perez, before I go on about our meeting back in early August, I'm going to take you back to Sunday where you were being -- you had the police officers and everybody confronting you and banging on the windows.

THE COURT: The question misstates the evidence.

MR. BRINDLEY: I'm sorry, your Honor. I'll rephrase the question.

THE COURT: Rephrase the question.

BY MR. BRINDLEY:

Q. When you saw the people outside that were knocking on the doors and windows back on Sunday, the fact of the matter is that on Sunday, around that time you said that you ended up contacting a lawyer, is that correct? Is that right?

A. Yes, yes.

Q. And the reason for is because you called me and I told you I couldn't do anything for you, you had to get a lawyer, correct?

A. Correct.

Q. And then you were able to get a lawyer in touch with you, correct?

A. Yes.

Q. Now, let's go back to the beginning of August when we had

our meeting, so we are absolutely clear about what happened.

You said you got angry when I told you that the facts shows your husband was guilty in my opinion, didn't you?

A. Yes.

Q. And what you were asking me when you came to my office is you wanted me to work with your husband's lawyer to come up with some kind of a strategy that could help both defendants, is that right?

A. Yes.

Q. And I told you that there was no such strategy, didn't I?

A. Yes.

Q. What I told you was that I knew from the evidence that your husband was guilty, right?

A. Yes.

Q. And I told you that from what I understood, I might have to call you as a witness to tell the truth about what happened on August 5th, didn't I?

A. Yes.

Q. And when I told you those things, you became angry with me as I gave you more details, you became more and more angry, correct?

A. Correct.

Q. And the fact of the matter is when I told you I might call you to testify of the truth of what happened on August 5th, you didn't want to do that, did you?

A. No.
Q. And, in fact, you left my office that time and refused to talk about any details, didn't you?
A. Yes.
Q. And the reason for that is because you knew that if I called you to tell the truth here you knew that that would hurt your husband, didn't you?
A. Yeah. Yes, I did.
Q. And you didn't want to be put in a position where you had to hurt your husband, did you?
A. I never would want to be put in that position, no.
Q. And when you called Joel Perez on the telephone and talked to him about speaking to me, you made it clear to Joel Perez you didn't like me, didn't you?
A. Yes.
Q. You said a lot of, let's say, pretty mean things about me, isn't that true?
A. Yes, I did. I said really mean things.
Q. And you said those things because you were angry about what I told you about what I believed and what I had to do for my client, didn't you?
A. Yes.
Q. And during the course of your conversation with your husband, you explained to him -- when you talked to him you explained to him your feeling that what I was saying would hurt

him, didn't you?
A. Yes.
Q. You explained to him that what I wanted to do you -- you used other words -- but what you told him was it would hurt him, wouldn't it?
A. Yes, it would.
Q. Because in this case, asking you to tell the truth, it does hurt him, you know that, don't you?
A. Yes.
Q. And you talked on the phone to your husband about trying to work out some sort of group strategy, or your husband did, between the lawyers, right?
A. Um-hum.
Q. But your understanding from meeting with me, I told you I couldn't do that because I had to advance the truth for my client, didn't I?
A. Yes.
MR. LEE: Objection.
THE COURT: The answer may stand.
BY MR. BRINDLEY:
Q. Now, Mrs. Perez, your -- the government asked you some questions about conversations you had with your husband about some ideas that I had about sentencing. Do you remember that?
A. Yes.
Q. When you came to my office on one of the occasions, I

don't remember which occasion, but there was an occasion where you asked me about certain ideas for sentencing that your husband wanted to know about, is that correct?

A. Yes.

Q. Okay. And I gave you some information about my -- the ideas that I had and strategies that I had used in the past, didn't I?

MR. LEE: Objection.

THE COURT: Overruled.

You may answer.

BY THE WITNESS:

A. Yes, you did.

BY MR. BRINDLEY:

Q. And after I did that, what I told you was that if your husband's lawyer wanted my previous arguments or anything I had done before, I would be happy to provide them to him. That's what I told you, didn't I?

A. Yes.

Q. And, Mrs. Perez, we never actually spoke about what you remembered -- specifically what you remembered about what happened on August 5th. We didn't actually talk about that until the 20th of August, right?

A. Right.

Q. You refused to talk to me about anything like that until after your husband pled guilty, right?

A. Correct.
Q. And then you did agree to answer my questions on August 20th, didn't you?
A. Yes.
Q. And when I spoke to you about what you remembered about August 5th, I told you that all I wanted you to do was tell us the truth about what happened. That's what I told you, isn't it?
MR. LEE: Objection.
THE COURT: Overruled.
You may answer.
BY MR. BRINDLEY:
Q. Isn't it?
A. Yes.
Q. And you still didn't want do it, did you?
A. No, I didn't.
Q. You didn't want to admit things that were going to hurt your husband even after he pled guilty, did you?
A. Correct.
Q. And you refused to testify voluntarily when I asked you, didn't you?
A. Yes.
Q. And then you left, right?
A. Yes.
Q. And it was after you refused to testify voluntarily that

I sent someone that you wouldn't suspect to give you a subpoena, isn't that right?
A. You sure did.
Q. And because of that subpoena you had to come to court, correct?
A. Yes. I'm here.
Q. And, Mrs. Perez, in fact, before you actually testified I asked you to conduct a follow-up interview with me before you actually took the stand, didn't I?
A. Yes.
Q. And during that interview I went over the testimony and I told you I wanted to make sure it was all accurate, correct?
A. Correct.
Q. And you again told me you did not want to testify about what happened, didn't you?
A. Yes. For fear that it would hurt my husband.
Q. And when you did that I told you Mrs. Perez, I don't represent your husband, didn't I?
A. Yes.
Q. And told you that I wasn't giving you a choice, didn't I?
A. Yes.
Q. Let's get one thing straight. During all the meetings that I ever had with you, Mrs. Perez, I never once told you what to say about anything, did I?
MR. LEE: Objection.

THE COURT: Overruled.

You may answer.

BY THE WITNESS:

A. No, you didn't.

BY MR. BRINDLEY:

Q. All I told you was that I wanted you to tell me what you knew, right?

A. Right.

Q. I never promised to do anything for you, did I?

A. No.

Q. The only thing I ever said that I would do for your husband was if his lawyer wanted help I would give him some arguments and things I had on certain sentencing issues, isn't that right?

A. Yes.

Q. And when you testified last Thursday you did tell the truth, didn't you?

A. Yes, I did.

Q. Even though you didn't want to, right?

A. Yeah.

MR. BRINDLEY: I don't have any other questions at this time, your Honor.

MR. LEE: Your Honor, may we have a brief side bar?

THE COURT: Yes.

(Proceedings heard at side bar:)

MR. LEE: Would it be possible to take a short break at this time?

THE COURT: Before you ask more questions?

MR. LEE: Yes.

THE COURT: How much more time do you think you are going to spend with her?

MR. LEE: Not too much more, but I want to make sure --

THE COURT: What about the tapes, are you going to play the tapes?

MR. LEE: Yes. But I plan on doing that -- introducing them through the MCC custodian.

THE COURT: Okay. So we will take a break.

MR. LEE: And then after she is done, we will call -- after I ask more questions, we will call the custodian.

THE COURT: Okay.

(Proceedings heard in open court:)

THE COURT: All right. Members of the jury, there will be a short break, and after this break there will be more questions of this witness, followed by the playing of certain tapes.

So this will take a few minutes. Enjoy your second cup of coffee.

The witness may leave the stand for a few minutes but not the area.

(Jury out.)

THE COURT: You may leave the stand.

MR. BRINDLEY: Your Honor, I'd like to take up one issue on the record before we leave.

THE COURT: You may leave.

MR. BRINDLEY: If we could have the witness exit, though.

THE COURT: Yes.

(Witness out.)

MR. BRINDLEY: Your Honor, as I see it there are two problems with what the government has indicated with what they want to do.

They have indicated they want to question Miss Perez again to some extent, and then they have indicated that they wish to introduce the tapes through an MCC custodian and publish them that way.

The problem with that, your Honor, is if they intend to offer these tapes as prior inconsistent statements --

THE COURT: I have already ruled on all of this and I you don't intend to reconsider the ruling.

MR. BRINDLEY: I'm not asking you to reconsider your ruling.

THE Court: What is the issue?

MR. BRINDLEY: The issue is pursuant to Rule 609, they can't put the actual inconsistent statements in unless

they offer the witness.

THE COURT: 609 deals with an entirely different issue. That deals with a prior conviction for perjury or it goes to a truth-telling misdemeanor, that is Rule 609.

MR. BRINDLEY: Maybe I'm misstating the rule, but they cannot put prior inconsistent statement on --

THE COURT: I have already entertained your argument.

MR. BRINDLEY: This is a different argument. Would you please let me explain? That's all I want to do.

THE COURT: I have already entertained your entire argument.

I have ruled and you earlier said you have no objection to the admissibility of the tapes. You wanted them all in, and I'm taking you at your word, and they will go in.

MR. BRINDLEY: Your Honor, I -- just for the record.

THE COURT: You can put it in writing. If you have a further objection, put it in writing and submit it during the course of the day or tomorrow.

We must go ahead with this case. I have permitted you to argue for 15 minutes. You then said you wanted the tapes to go in and they will go in.

MR. BRINDLEY: Your Honor, I can't --

THE COURT: There will be a short recess and you can put your objections into writing.

(Recess.)

THE COURT: Let's recall the witness.

MR. LEE: Yes, your Honor.

REDIRECT EXAMINATION

BY MR. LEE:

Q. The name of your husband's lawyer is Frank, isn't it?

A. Yes.

MR. LEE: No further questions at this time.

MR. BRINDLEY: Nothing else for me, your Honor.

THE COURT: All right. You may step down.

(Witness excused.)

THE COURT: Please call the next witness.

MS. TRIVEDI: Your Honor, the government calls Officer Daniel Gutierrez.

THE COURT: Swear in the witness.

(Witness sworn.)

DANIEL GUTIERREZ, PLAINTIFF'S WITNESS, SWORN

DIRECT EXAMINATION

BY MS. TRIVEDI:

Q. Good morning.

A. Good morning.

Q. Can you please state and spell your name for the record.

A. Officer Daniel Gutierrez, G-U-T-I-E-R-R-E-Z.

Q. Officer Gutierrez, where do you work?

A. I am employed by the Chicago Police Department, but I am currently assigned to the DEA as a task force officer.

Q. And as a task force officer, do you help out the DEA with their investigations?

A. Yes, I do.

Q. By DEA, do you mean the Drug Enforcement Administration?

A. Yes.

Q. How long have you been a Chicago police officer?

A. 19 and a half years.

Q. Drawing your attention to this last Sunday, were you working in a DEA task force officer capacity that day?

A. Yes.

Q. And what were you doing on Sunday, Officer Gutierrez?

A. I was assigned to serve a federal subpoena.

Q. Officer Gutierrez, in your years as a police officer and a DEA task force officer, have you received any training?

A. Yes.

Q. What sorts of training have you received?

A. Entry training, surveillance training, counter-surveillance training.

Q. Officer Gutierrez, focusing now on this last Sunday, were you keeping in contact with other law enforcement officers at the time?

A. Yes, I was. I was keeping in contact with the case agent from DEA.

Q. And as you were keeping in contact with the case agent from DEA, did you receive any specific information about a task

that you were supposed to do on Sunday?
A. Yes, I did. I received information to serve a subpoena, a federal subpoena to a Marina Perez who resided at 7554 West Forest Preserve Drive, Chicago, Illinois.
Q. Did you receive any other information about addresses where Marina Perez may have been?
A. Yes. I was informed that she also had access to 7550 West Forest Preserve Drive, which was directly next door about ten feet apart.
Q. After you received that information, what did you do?
A. I then, using my Chicago police radio, I asked for assistance from a --
MR. BRINDLEY: Your Honor, objection. Collateral impeachment.
THE COURT: Overruled.
You may complete your answer.
BY THE WITNESS:
A. I used my Chicago police radio and I asked for assistance because I was alone. After which a uniformed two-man unit approached me and assisted me. I then walked to 7554 West Forest Preserve Drive with the two uniformed officers with me, and I proceeded to knock on the door of 7554 West Forest Preserve Drive.
BY MS. TRIVEDI:
Q. Did you also ring the doorbell?

A. I rang the doorbell, yes.
Q. Did you announce anything while you were at the door at 7554 West Forest Preserve Drive?
A. I announced my office.
Q. And what does that mean, Officer Gutierrez?
A. I announced that I'm a Chicago police officer as I knocked on the door and as I rang the doorbell.
Q. And approximately what time was this on Sunday?
A. Approximately 1:40 p.m.
Q. Now, while you were standing there with the two uniformed police officers ringing the doorbell, knocking on the door, announcing police, did anyone respond from inside the house?
A. No one responded.
Q. What did you do next?
A. I then knocked on 7550 West Forest Preserve Drive, and I knocked on the door and knocked on the window.
Q. Officer Gutierrez, how far is 7550 West Forest Preserve Drive from 7554 West Forest Preserve Drive?
A. It is immediately the next house to the east.
Q. When you went to 7550 West Forest Preserve Drive, was anyone else with you?
A. I had the same two uniformed Chicago Police Department officers.
Q. When the three of you arrived at 7550, what did you do again, Officer Gutierrez?

A. I then walked up to the front door, there was no doorbell, but I knocked on the screen door and the front door and on the side panel window.
Q. Did you say anything?
A. I announced my office, Chicago police officer.
Q. And was tHat in a loud tone of voice?
A. Yes.
Q. After that what happened, Officer Gutierrez?
A. No answer. I then walked off and I walked with the two officers and I stated to them I would be in the area and that I would attempt to do it again, if they would assist me later on that day.
Q. Did you go to another address?
A. Yes, I did.
Q. What address did you go to?
A. 4515 North Mulligan, Chicago, Illinois.
Q. And were you able to serve the subpoena at 4515 North Mulligan?
A. I was not able to.
Q. After that, what did you do?
A. I then went back to 7554 West Forest Preserve Drive.
Q. What happened next?
A. I approached with the same two officers. I approached the front door of 7554, rang the door well, knocked on the door, knocked on the windows, no answer.

Q. About what time was this, Officer Gutierrez?
A. Approximately 3:30 p.m.
Q. So how long was your trip to Mulligan in between the two?
A. 20 minutes.
Q. Now, after no one answered -- I'm sorry, let me just focus for one moment on your second time knocking at 7554 West Forest Preserve.

At that point did you make any -- did you say anything?

A. I announced my office, Chicago Police Department, very loud. I then also walked over to 7550 and knocked on that door as well.
Q. And did you announce that you were a police officer there too?
A. Yes, I did.
Q. Was that loud?
A. Loud, knocked very loud, and I got no answer also.
Q. What did you do next?
A. I then -- I left the area.
Q. And -- one moment.

MS. TRIVEDI: No further questions.

CROSS EXAMINATION

BY MR. BRINDLEY:

Q. Officer, when you went to the addresses on Forest Preserve Drive, there were multiple police officers there,

correct?
A. Myself and two other.
Q. Okay. And you made multiple attempts to knock on the door, ring the bells, correct?
A. Yes.
Q. And you said you announced your office as a Chicago police officer, right?
A. Yes.
Q. But you didn't announce anything about a subpoena, did you?
A. No.
Q. Okay. And you never actually spoke to Ms. Perez at that time, did you?
A. No.
Q. So you didn't tell her -- you never got the opportunity to tell her what you were there for, did you?
A. No.

MR. BRINDLEY: Nothing else.

REDIRECT EXAMINATION

BY MS. TRIVEDI:

Q. Officer Gutierrez, as you go to serve a subpoena, is there a concern that the person you are serving on may try to avoid service?
A. That is correct.
Q. So when you knocked, you announced you are police,

correct?
A. Yes.
Q. But if you had -- you did not -- you purposefully did not announce you were there to serve a subpoena, is that correct?
A. That is correct.
MR. BRINDLEY: No other questions, your Honor.
THE COURT: You may step down, Officer.
(Witness excused.)
THE COURT: Please call the next witness.
MR. LEE: Yes, your Honor.
The government calls Vicente Blas.
THE CLERK: Please raise your right hand.
(Witness sworn.)

VICENTE BLAS, PLAINTIFF'S WITNESS, SWORN

DIRECT EXAMINATION

BY MR. LEE:
Q. Could you please state your name for the record and spell it for the court reporter.
A. Vicente Blas, V-I-C-E-N-T-E, Blas, B-L-A-S.
Q. Are you currently employed?
A. Yes, I am.
Q. Where are you employed?
A. Metropolitan Correctional Center, MCC, Chicago.
Q. And you mentioned the initials MCC, is that a way of referring to the Metropolitan Correctional Center?

A. Yes, it is.
Q. And MCC, is that part of any kind of a federal agency?
A. Yes, it is.
Q. And what agency is that?
A. It's under the Department of Justice, Federal Bureau of Prisons.
Q. What is your position at the MCC?
A. My position, I'm a special investigative support technician.
Q. What does that mean?
A. I assist in the investigations of gathering information, basically recordkeeping.
Q. And what are your duties in that job?
A. I'm the lead technician. Anything to -- as far as comply with subpoenas and also to assist in investigations within the prison system.
Q. Does the MCC monitor calls by inmates?
A. Yes.
Q. And does it do so as part of its regular course of business?
A. Yes, it is.
Q. And are inmates informed that their calls are not private?
A. Correct. Yes, it is.
Q. And does the MCC record calls at or near the time they

are made?
A. Yes, it is.
Q. How does the MCC store calls?
A. Once the calls are being made, it automatically goes into a phone bank. It's generated automatically into a computer system.
Q. So are telephone calls recorded as computer files?
A. Yes, it is.
Q. Are those computer files files that can be played on computers outside the MCC?
A. Yes, it is, it can be played.
Q. And what kind of information does the MCC store along with recorded conversations?
A. A recorded conversation records the person's register number. It can also record, which it does record, the PAC number. It does record the telephone numbers, the person's PAC, or personal identification number, and the date and time those phone calls were made.
Q. And is that information stored within the title of the computer file for a recorded conversation?
A. Yes, it is.
Q. You mentioned a register number, what's that?
A. A register number is what we consider the inmate's identification number.
MR. LEE: May I approach the witness, your Honor?

THE COURT: Yes.

BY MR. LEE:

Q. I'm showing you what has been previously marked as Government Exhibit 8-1-09 Call.

Can you tell the jury what this is?

A. This is a CD of a recorded telephone call.

Q. And just to be clear, you recognize this?

A. Yes, I do.

Q. And how do you recognize it?

A. By our -- the date and time of the call, the call was made, also the date that the call was recorded. We have our own, what we call our ECN numbers, which identifies the -- it's like a case number.

Q. And looking at the CD, do you -- what is the recording that's on the CD?

A. The recording has the individual's name, register number, telephone number, the date, and the time of the call.

Q. And what recording is actually on the CD?

A. This is the actual conversation, telephone conversation.

Q. What telephone conversation is this?

A. It's to a telephone number which is (773) 589-9897.

Q. And who is this call from?

A. This is from Joel Perez.

Q. And what is the date and time of this call?

A. 8-1-09, the time is 11:02.

Q. You mentioned 11:02, is that a.m. or p.m.?
A. I have a.m.
Q. And you mentioned the telephone number (773) 589-9897.
Do you have an understanding as to who that number belongs to?
MR. BRINDLEY: Objection, foundation.
THE COURT: All right. The -- you earlier moved for and the Court ruled on the admissibility of the entirety of the tapes. The objection is overruled.
You may proceed to lay a better foundation in terms of their reliability and authenticity.
BY MR. LEE:
Q. Mr. Blas, you mentioned this -- you said that this call was from a certain person. How do you know that?
A. It's -- first it will have its own PAC number. We searched under the individual's registration number which we say is the identification number assigned to the person, and this goes to Joel Perez.
Q. Were you involved in some way in creating that disk?
A. Yes.
Q. And so your understanding as to the date to the recipient of the call?
A. Yes.
Q. And what is that understanding based on?
A. As far as the recipient of the call, in speaking about

where the phone number was called to, is to that same phone number which I just mentioned, which is (773) 589-8997.

Q. Do you have an understanding as to who that telephone number belongs to?

A. Yes. Under the telephone list, the individual would put a request to make a telephone call -- to be approved to make a telephone call to that number, and it's assigned to spouse.

MR. LEE: At this time, your Honor, the government moves for admission of Government Exhibit 8-1-09 Call.

THE COURT: All right. Mrs. Perez earlier in her own testimony indicated that she had made several conversations. The government's motion to admit is granted, and based upon the earlier ruling, the conversations may be published to the jury.

MR. BRINDLEY: Your Honor, for the record, I object pursuant to Rule 613.

THE COURT: I have ruled twice already --

MR. BRINDLEY: Yes, your Honor.

THE COURT: -- on this point. And you earlier stated that you moved the admissibility of the entirety of the conversations, and I granted your motion to admit them.

They are received.

(Government Exhibit 8-1-09 Call received in evidence.)

MR. LEE: Your Honor, the government would move to publish this exhibit to the jury after some further exhibits with this witness.

THE COURT: Proceed.

MR. LEE: May I approach the witness?

THE COURT: Yes.

BY MR. LEE:

Q. Mr. Blas, I'm handing you what has been previously marked as Government Exhibit 8-5-09 Call, Government Exhibit 8-12-09 Call, and Government Exhibit 8-13-09 Call.

Turning to Government Exhibit 8-5-09 Call, were you involved in the creation of that exhibit?

A. Yes, I was.

Q. And do you recognize it?

A. Yes, I do.

Q. And what is it?

A. It's recorded telephone conversations, copy of conversations.

THE COURT: Can you move this along a little bit? There is a conversation of 8-1, 8-5, 8-12, and 8-13, is that correct?

MR. LEE: Yes, your Honor.

THE COURT: All right. Proceed to inquire of all four at the same time.

MR. LEE: Thank you, your Honor.

BY MR. LEE:

Q. Regarding the three exhibits that I just handed you, are those recordings of telephone conversations made by Joel Perez

to his spouse at various telephone numbers on August 5th, August 12th, and August 13th, 2009 at the dates and times listed on the face of each exhibit?

A. Yes, they are.

MR. LEE: Your Honor, the government moves for admission of the exhibits.

MR. BRINDLEY: Objection pursuant to Rule 613.

THE COURT: I have already ruled at least three times that these tapes may be played to the jury having granted the defense motion that they be admitted in their entirety and played to the jury. So to be consistent with my several earlier rulings, you may proceed.

MR. LEE: Yes, your Honor.

THE COURT: They may be played to the jury.

MR. LEE: Yes. I think at this time I'd ask the witness to be excused. I'm done with questions for the witness and I would like to play the tapes.

THE COURT: There is a sufficient foundation for the admissibility of these exhibits.

The witness is excused.

You may play the tapes to the jury.

MR. LEE: Thank you, your Honor.

THE COURT: You may step down, Officer.

(Witness excused.)

MR. LEE: The government is now playing Government

Exhibit 8-1-09 Call.

(Government Exhibit 8-1-09 Call played in open court.)

MR. LEE: At this time, your Honor, the government would play Government Exhibit 8-5-09 Call.

THE COURT: Proceed.

(Government Exhibit 8-5-09 Call played in open court.)

MR. LEE: Your Honor, before the government plays the next exhibits, it might be a good time now to take a lunch break.

THE COURT: Mr. Brindley, what's your position?

MR. BRINDLEY: That's fine with me, your Honor.

THE COURT: All right.

Members of the jury, is an hour enough? All right. Please return at 1:15.

(Proceedings recessed at 12:25 p.m. to 1:15 p.m.)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	08 CR 625
	)	
vs.	)	Chicago, Illinois
	)	September 1, 2009
ALEXANDER VASQUEZ,	)	1:15 p.m.
	)	
Defendant.	)	

VOLUME 5
TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE CHARLES R. NORGLE, SR.
AND A JURY

APPEARANCES:

For the Plaintiff:	OFFICE OF THE U.S. ATTORNEY 219 South Dearborn Street 5th Floor Chicago, Illinois 60604 BY: MR. STEPHEN CHAHN LEE MS. KRUTI TRIVEDI
For the Defendant:	LAW OFFICES OF BEAU B. BRINDLEY 53 West Jackson Boulevard Suite 1605 Chicago, Illinois 60604 BY: MR. BEAU B. BRINDLEY MS. BLAIR WESTOVER
Court Reporter:	MAELLEN E. PITTMAN Official Court Reporter 219 South Dearborn Street Room 2342 Chicago, Illinois 60604 (312) 435-5576

(Proceedings heard in open court. Jury out.)

THE COURT: Mr. Brindley, ready to go?

MR. BRINDLEY: I'm ready to go when the government is, your Honor.

THE COURT: Mr. Lee, are you ready?

MS. TRIVEDI: Your Honor, if we could talk to you before the defendant comes out.

MR. BRINDLEY: Can we bring the defendant out too, your Honor?

THE COURT: Yes.

(Pause.)

THE COURT: The defendant is personally present.

And I notice that Mr. Lipuma has also joined us this afternoon.

MR. LIPUMA: Good afternoon, your Honor.

Frank Lipuma on behalf of Joel Perez. Judge, I actually was here all morning. I was not in the courtroom. I was outside with my client across the hallway.

THE COURT: All right.

MR. LIPUMA: The government has made an indication to me it is going to require Mr. Perez's presence, I believe.

THE COURT: Before we get to that, is there another issue?

MS. TRIVEDI: Yes, your Honor, there is.

THE COURT: Okay.

MS. TRIVEDI: The other issue deals with conflict. And more specifically, the Judge advised Mr. Vasquez of a potential conflict between him and his attorney.

At this point the government would ask that your Honor again advise Mr. Vasquez of the conflict and specifically that your Honor advise Mr. Vasquez that it is possible that Mr. Brindley is not currently the target of an investigation, but that he could become a target and later be prosecuted; that there is a possibility in order to protect himself from prosecution he may fail to raise certain defenses on his behalf that should be raised; that he may try to curry favor with the government; and that the attorney may attempt to make some sort of deal with the government or that he may take other actions that would be adverse to his own. So that Mr. Vasquez can knowingly waive that.

Of course, your Honor, I am not saying that at this point there is a criminal investigation into Mr. Brindley, but I would like Mr. Vasquez to say on the record that he is aware that they may have different motives and that there may be a conflict between the wills of the client and the will to himself.

THE COURT: Mr. Vasquez, did you hear all of that?

THE DEFENDANT: Yes, your Honor.

THE COURT: Do you want to say anything?

THE DEFENDANT: No, your Honor.

THE COURT: Do you want Mr. Beau Brindley to proceed as your lawyer in this case?

THE DEFENDANT: Yes, sir.

THE COURT: Do you have any questions about this?

THE DEFENDANT: No, sir.

THE COURT: You heard what the prosecutor said?

THE DEFENDANT: Yes, your Honor.

THE COURT: Do you want to have your attorney replaced?

THE DEFENDANT: No.

THE COURT: If you do not have enough money to hire an attorney to replace your present attorney, the Court would appoint the Federal Defender to represent you.

Do you understand that?

THE DEFENDANT: Yes, your Honor.

THE COURT: You also have the right to counsel of your choice. And is it Mr. Brindley who is the counsel of your choice?

THE DEFENDANT: Yes, your Honor.

THE COURT: You have a constitutional right to have the lawyer of your choice.

Do you understand that?

THE DEFENDANT: Yes, your Honor.

THE COURT: However, as the government has just indicated, this could present a problem in terms of

Mr. Brindley's representation of you. As the prosecutor has indicated, the theory would be that in effect Mr. Brindley would not be a zealous advocate on your half because of concerns that he might have in terms of his own problems in the event the government were to take action against him.

Do you understand that?

THE DEFENDANT: Yes, your Honor.

MS. TRIVEDI: And, your Honor, to be clear, the trial team would not be making any decisions as to that, that is a separate matter unrelated to the trial team.

THE COURT: In any event, it may be in the mind of Mr. Brindley, if not the reality of the situation, the theory goes, that he had better be careful in terms of how he represents you for fear of the potential for problems on his own behalf in the future in retaliation or otherwise; that this may be in the mind of Mr. Brindley as he continues to represent you.

But all said and done, you have heard what the government has said. You must recall that we went into this yesterday and now you are aware that there is once again this issue of conflict. If you have any questions regarding this, this is the time to ask them.

Do you have any questions?

THE DEFENDANT: No, sir.

THE COURT: What is it that you want to do?

THE DEFENDANT: With regards to him being my attorney?

THE COURT: In terms of Mr. Brindley continuing to be your lawyer, what is it that you want to do?

THE DEFENDANT: I want him to continue being my attorney.

THE COURT: Are you saying you are exercising your constitutional right to have Mr. Brindley as your attorney of choice?

THE DEFENDANT: Yes, your Honor.

THE COURT: And you have heard the concerns expressed by the government, have you not?

THE DEFENDANT: Yes, your Honor.

THE COURT: You have all of that in mind?

THE DEFENDANT: Yes, your Honor.

THE COURT: Do you understand it?

THE DEFENDANT: Yes.

THE COURT: So once again, what have you decided to do?

THE DEFENDANT: Keep Mr. Brindley as my attorney.

THE COURT: All right. Then the Court respects your position and Mr. Brindley will remain your attorney.

MR. BRINDLEY: Thank you, your Honor.

THE COURT: All right.

Now, the other issue with Mr. Lipuma is what?

MR. BRINDLEY: Mr. Lipuma is not in here now, your Honor.

(Pause.)

MR. LIPUMA: Good afternoon, your Honor.

THE COURT: Good afternoon.

MR. LIPUMA: Frank Lipuma. I am with my client Joel Perez.

THE COURT: Joel Perez is personally present.

The Court yesterday entered an order of immunity and that now apparently is the issue.

MR. LIPUMA: Yes, Judge.

The government -- I had asked several times today about the government's final decision on whether Mr. Perez would be a witness in this case and I think I received an affirmative response a few moments ago.

THE COURT: Is it your intention to call Mr. Perez?

MS. TRIVEDI: Yes, your Honor, it is.

THE COURT: And, Mr. Perez, if you are called, do you intend to take the witness stand and give truthful testimony?

MR. LIPUMA: Judge, if I may make a short statement for purposes of the record in this case.

THE COURT: Yes, proceed.

MR. LIPUMA: Thank you, your Honor.

Judge, Joel Perez pleaded guilty because he was guilty and he is guilty. He still accepts responsibility for

his actions. He stands by the factual basis in the plea agreement entered in this case. He does not want to withdraw his plea of guilty and he wishes to proceed to sentencing in front of this honorable Court.

Despite the apparent interference from a co-defendant's attorney with an existing attorney-client relationship, Joel ultimately did the right thing, Judge. He followed my advice and pleaded guilty and along the way in the factual basis advised the Court what happened.

Joel Perez has no control over his wife or what she does. Unfortunately, he has no control over any of this. From the way things seem to me, and granted I don't know everything about this case, I did not sit through this trial. In fact, I have only heard one recorded conversation between Mr. Perez and his wife. I have not heard any other conversations. And I just this afternoon was provided with supposedly the last transcript. But from what I have heard and seen and my understanding of the evidence from day one in this case, the government doesn't even need Joel Perez's testimony.

He is in a jam, and there are ways to resolve this that reasonable people could resolve, but we believe that it's being handled unreasonably.

I advised my client, Judge, to comply with the order of immunity as I'm required to do as an officer of this Court. With all due respect to this Court and to your Honor

personally, Mr. Perez is requesting to be excused from testifying in this matter. In the event the Court cannot excuse him, with all due respect, he respectfully declines to testify and the reason is simple.

It has nothing to do with his co-defendant. It has everything to do with the fact that he does not want to put his wife, and most importantly, his son in a position of peril; that is, he doesn't want his boy to lose a mother in addition to a father as I believe any reasonable person would do in his position.

Thank you, Judge.

THE COURT: Did you hear what your attorney just said?

MR. PEREZ: Yes, your Honor.

THE COURT: Are you saying you refuse to testify?

MR. PEREZ: Yes, your Honor.

THE COURT: Are you saying you refuse to comply with the order?

MR. PEREZ: Yes, your Honor.

THE COURT: Then I find that you are in contempt of Court and I order you incarcerated until further order of the Court.

MS. TRIVEDI: Your Honor, it -- and I apologize for interrupting.

THE COURT: Yes.

MS. TRIVEDI: Your Honor, could you please also inform Mr. Perez that along with civil contempt, there is the possibility of criminal contempt, and that if that were to happen, he would be facing a potential maximum sentence of life.

THE COURT: Do you understand that?

MR. PEREZ: Yes.

THE COURT: What is it that you have decided to do?

MR. LIPUMA: Judge, he would like to please speak briefly with me for a moment, please.

THE COURT: Go ahead.

(Pause.)

MR. LIPUMA: Judge, Mr. Perez does not understand the prosecutor's comment about being subject to life imprisonment. So he --

THE COURT: He doesn't understand that.

Well, the idea is that the government could seek an indictment asking the grand jury to determine that you are in criminal contempt of Court, and if you are found guilty, there is the potential for years of incarceration.

If the government has looked into this and if the maximum sentence is life, I will accept that representation. But it is clear that if you are found in criminal contempt, you can be sentenced to a period of years in the Bureau of Prisons.

Do you understand that?

MR. PEREZ: Yes, yes, your Honor.

THE COURT: What have you decided to do?

MR. PEREZ: I respectfully request to be excused from testifying, your Honor.

THE COURT: You must comply with the order.

If the government intends to seek an indictment or proceed criminally against the defendant, the government should take that action. But for the present you are found in contempt of Court for failure to comply with the order, the written order of the Court yesterday, and you are committed to the MCC until further order of the Court.

You may leave.

MR. LIPUMA: Thank you, your Honor.

MS. TRIVEDI: Your Honor, as a matter of -- for this -- I don't know if we need Mr. Perez still or not. But we'd ask that -- that he be given the night to think about this and maybe --

THE COURT: Well, he has been ordered to the MCC in custody until further order of the Court.

MS. TRIVEDI: Thank you, your Honor.

At this point we do have additional evidence we can present aside from Mr. Perez.

THE COURT: Well, we have two more tapes to play, that's for sure.

So let's bring the jury in and play those two tapes

and we'll go from there.

MS. TRIVEDI: Thank you.

THE COURT: Can you ask the jury to come in, Eric.

THE CLERK: I did.

THE COURT: Okay.

(Jury in.)

THE COURT: Good afternoon, members of the jury.

Please play the next recording.

MR. LEE: Thank you, your Honor.

At this time the government will play Government Exhibit 8-12-09 Call.

(Government Exhibit 8-12-09 Call played in open court.)

MR. LEE: Your Honor, at this time the government would play Government Exhibit 8-13-09 call.

THE COURT: Proceed.

(Government Exhibit 8-13-09 Call played in open court.)

MR. LEE: The government is prepared to call its next witness, but may I have a brief moment to confer with defense counsel?

THE COURT: At the side bar?

MR. LEE: No, I don't need a side bar.

THE COURT: Okay. Proceed.

(Pause.)

MR. LEE: The government calls Special Agent James Chupik.

JAMES CHUPIK, PLAINTIFF'S WITNESS, PREVIOUSLY SWORN

DIRECT EXAMINATION

BY MR. LEE:

Q. Agent Chupik, you understand that you are still under oath from your prior testimony?

A. Yes, sir, I do.

MR. LEE: May I approach the witness, your Honor?

THE COURT: Yes.

BY MR. LEE:

Q. Agent Chupik, I'm handing you what has been marked as Government Exhibit Northwest Chicago Overview.

Do you recognize this?

A. Yes, sir.

Q. What is it?

A. This is an aerial map from the computer of northwest Chicago. It's got 7550 West Forest Preserve Avenue and 4515 North Mulligan Avenue, both in the City of Chicago, marked.

Q. And does this exhibit truly and accurately reflect the area that's depicted in the photo?

A. Yes, sir. Yes, it does.

MR. LEE: Your Honor, the government moves for admission of Government Exhibit Northwest Chicago Overview.

MR. BRINDLEY: No objection.

THE COURT: The exhibit is received.

MR. LEE: May I publish to the jury?

THE COURT: Yes.

(Government Exhibit Northwest Chicago Overview received in evidence.)

BY MR. LEE:

Q. Agent Chupik, just to get us situated a little bit, can you -- I'm going to hand you, if I may, a laser pointer.

You mentioned some addresses. Could you point those out for the jury.

A. Bottom left-hand corner is 7550 West Forest Preserve Avenue; approximately center of this map is 4515 North Mulligan Avenue; and across the top of the map running sort of northeast -- or should be northwest to southeast, is the Kennedy Expressway 90/94.

Q. The part that you were just pointing to on the top of the page, what expressway is that?

A. That is the Kennedy Expressway.

Q. And is it also known by an interstate designation?

A. I believe that's 94, yes, sir. Actually, I'm sorry, I-90. 94 you can see over towards -- goes north.

Q. And does I-90 go from, among other places, Chicago to Arlington Heights.

A. Yes, sir, it does.

Q. Now you mentioned two addresses. Between those addresses would you point out any major intersections. Perhaps I should zoom in a little bit.

A. Harlem Avenue and Forest Preserve Drive intersect here (indicating), and just south of the intersection is Irving Park Road and Harlem Avenue.

MR. LEE: May I approach the witness, your Honor?

THE COURT: Yes.

BY MR. LEE:

Q. Agent Chupik, I'm handing you what has been previously marked as Government Exhibit Recording of August 5th, 2008 Call at approximately 3:57 p.m., Government Exhibit Transcript of August 5th, 2008 3:57 p.m. Call, Government Exhibit Recording of August 5th, 2008 Call at approximately 4:46 p.m., and Government Exhibit Transcript of August 5th, 2008 4:46 p.m. Call.

A. Yes, sir.

Q. Do you recognize these exhibits?

A. I do.

Q. What are they?

A. The two compact disks contain recorded calls between my confidential source and Carlos Cruz on August 5th, 2008 as reviewed by myself and Carlos Cruz as indicated by our initials, my initials as well as Carlos Cruz's initials, both on the disks as well as the transcripts.

Q. And have you personally reviewed these -- the recordings?

A. Yes, sir, I have.

Q. And have you reviewed the transcripts?

A. Yes, sir, I have.
Q. And have you identified the voices on the transcripts?
A. Yes, sir, I have.
MR. LEE: At this time, your Honor, the government would like to read a stipulation.
THE COURT: You may proceed.
MR. LEE: The United States of America, through Assistant United States Attorneys Stephen Chahn Lee and Kruti Trivedi and defendant Alexander Vasquez, Jr., individually and through his attorney Beau Brindley, hereby agree and stipulate that the following facts are true:
Each of the recordings contained on Government Exhibits Recording of August 5th, 2008 Call at Approximately 3:57 p.m. and Recording of August 5th, 2008 Call at Approximately 4:46 p.m. are true and accurate conversations recorded by the Drug Enforcement Administration's confidential source in this matter at the dates and times indicated on Government Exhibits Transcript of August 5th, 2008 3:57 p.m. Call and Transcript of August 5th, 2008 4:46 p.m. Call.
Each of the recordings contained on Government Exhibit Recording of August 5th, 2008, Call at approximately 3:57 p.m. and Recording of August 5th, 2008, Call at approximately 4:46 p.m. accurately produces both the words spoken and the sounds of the speakers' voices as those words were spoken and as those sounds occurred in the original

conversations reproduced in each of the recordings.

Government Exhibit Transcript of August 5th, 2008 3:57 Call and Transcript of August 5th, 2008 4:46 Call are accurate transcripts of those recordings of the Government Exhibits Recording of August 5th, 2008 Call at approximately 3:57 p.m. and Recording of August 5th, 2008 Call at approximately 4:46 p.m. that were in the English language and are accurate translations of those portions of the recorded conversations that were in the Spanish language and accurately identify the speakers in those conversations.

With that, your Honor, the government would move for admission of Government Exhibit Exhibits Recording of August 5th, 2008 Call at approximately 3:57 p.m. and Recording of August 5th, 2008 Call at approximately 4:46 p.m., Transcript of August 5th, 2008 3:57 p.m. Call and Transcript of August 5th, 2008 4:46 p.m. Call.

THE COURT: The exhibits are received.

MR. BRINDLEY: No objection.

MR. LEE: Thank you, your Honor.

May I publish the transcripts to the jury?

(Government Exhibits Recording of August 5th, 2008, Call at Approximately 3:57 p.m. and Recording of August 5th, 2008, Call at Approximately 4:46 p.m. and Transcript of August 5th, 2008 3:57 p.m. Call and Transcript of August 5th, 2008 4:46 p.m. Call received in evidence.)

THE COURT: Yes.

MR. LEE: And if I may, your Honor, I'll ask to publish to the jury. I'll ask Agent Chupik to read the parts of the conversations that were done by Carlos Cruz and I will read the parts done by the confidential source.

THE COURT: Is there any objection to that procedure?

MR. BRINDLEY: No, your Honor.

THE COURT: All right. You may proceed accordingly.

MR. LEE: The transcript first reflects that there is a voicemail message.

And the voicemail message says, Hi, this is Carlos Cruz. Thank you for choosing to call me. As soon as possible I'll return your call back. Thank you. Record your message after the tone. To send a numeric page, press 5. When you are done recording, hang up.

THE WITNESS: And that's what I thought. That's why I was waiting for you to begin.

MR. LEE: I apologize. I will read the part of the confidential source.

MR. LEE: And --

THE WITNESS: Listen, if I take Irving Park, will I run into Arlington from there?

MR. LEE: Irving Park, uh --

THE WITNESS: Yeah.

MR. LEE: Why don't you take Touhy and then --

THE WITNESS: It's that I have to pick up Primo over by Irving Park and Harlem.

MR. LEE: Okay. So then you'll come to -- well, get on the expressway there by Harlem.

THE WITNESS: On Harlem, right.

MR. LEE: Yeah, get on and go west.

THE WITNESS: Does Harlem run into I-90 there?

MR. LEE: I-90 West.

THE WITNESS: Because we're going to Arlington, Babe. After Harlem, since it's north, I'll be on the -- on the highway, right.

MR. LEE: Just look where it says west. If you are going to go there, it's going to indicate where the expressway is. For example, it will just take you north.

THE WITNESS: Okay. But I'm going to go pick him up now.

MR. LEE: Then you'll go up west and you're going to pass by where you pay the -- that tollway, $1, and right away you're gonna drive about four miles and you're gonna see a sign that says Arlington, turn left.

THE WITNESS: Go right.

MR. LEE: And when you're ready to exit there give me --

THE WITNESS: Be on the lookout, keep your phone handy so that you can give me directions.

MR. LEE: Yeah. Call me when you exit, so I can tell you exactly where.

THE WITNESS: All right.

MR. LEE: Okay. Bye.

MR. LEE: And just to be clear, that was Government Exhibit Transcript of August 5th, 2008 3:57 p.m. Call.

THE COURT: Yes.

MR. LEE: I will now publish in the same manner Government Exhibit Transcript of August 5th, 2008 4:46 Call.

Agent Chupik, if I could have you read the same.

THE WITNESS: Hello.

MR. LEE: Yeah. What's up.

THE WITNESS: Man, I got caught in traffic going up there, bro. It's a motherfucker. I had to exit the fuck out on Irving Park.

MR. LEE: Oh, yeah, so more or less how long.

THE WITNESS: Well, right now I'm going to -- to -- to Irving Park and Harlem to pick up my cousin and then over there.

MR. LEE: How long?

THE WITNESS: I'm coming from the Lake.

MR. LEE: Call me -- call me when you are passing the --

THE WITNESS: Which one? Right now I was going to go on the expressway.

MR. LEE: Uh, okay.

THE WITNESS: Uh.

MR. LEE: And the call ends.

Nothing further from the government from this witness at this time.

MR. BRINDLEY: No examination, your Honor. Nothing from the defense.

THE COURT: You may step down. Thank you.

THE WITNESS: Thank you, your Honor.

(Witness excused.)

MR. LEE: Your Honor, may we have a brief side bar?

THE COURT: Yes.

(Proceedings heard at side bar:)

MR. LEE: Your Honor, this is the point where we would call Joel Perez. At this time then we would like -- as we said earlier, we would like to give Joel Perez the night to think over the contempt order and see if there is any chance if he -- in the morning if he continues to -- continues to be in contempt, then we would be prepared to rest.

THE COURT: So first, what we have to do is deal with the jury instructions unless you have totally resolved all those issues.

MR. LEE: I think most issues have been resolved. I think there are one or two issues.

MR. BRINDLEY: There are some issues, yes.

THE COURT: We have to deal with jury instructions to begin with. And if we were to do that, then it would take us to closing arguments. It is now 2:00 o'clock. If we were to end today, it would mean that the jury would probably get the case for deliberations about 4:30, which is not a good time to start deliberations. So the better course of that I think would be to send the jury home.

We will deal with the jury instructions, give Joel Perez time to confer with Mr. Lipuma and perhaps others, and know what he intends to do tomorrow morning at 10:00 o'clock.

So in short, I would send the jury home, tell them to come back tomorrow morning at 10:00 o'clock and after about a 10- or 15-minute recess. We would get to the jury instructions.

MR. LEE: That sounds fine, your Honor.

THE COURT: It also gives you overnight to get ready for your closing arguments.

MR. LEE: Thank you, your Honor.

MS. TRIVEDI: Thank you, your Honor.

THE COURT: Which may be more complicated than you originally thought. Okay.

(Proceedings heard in open court:)

THE COURT: All right. Members of the jury, it may well be that you have heard the last witness, but not necessarily. There are a number of things that the Court must

deal with that do not require your presence.

So the way matters appear for now is that the case would be yours tomorrow for deliberations. At least that's the way things appear at the moment. It is conceivable that it could take an additional day. But more likely than not, the case, as I have said, would be yours for deliberations. Tomorrow I would read the instructions to you after the closing arguments, and then you would go in to deliberate, taking into the jury deliberation room the various items that have been received in evidence.

So I will hold you no longer this afternoon. The Court and counsel do have matters to deal with, however.

And once again, I want to caution you not to discuss this case amongst yourselves or with any other persons. Do not attempt to do any kind of investigation, either personally or directly or on the Internet, Google or Yahoo or Jeeves or whatever.

It is important that you make your decision based upon the evidence that you have seen and heard in this courtroom. You must follow the law as it will be given to you by the Judge at the end of the case.

Do not let any person interfere with your ability to do your duty in this case. So don't discuss this case with anyone. I hope you understand that.

So once again, you are excused and please return

tomorrow at 10:00 o'clock.

(Jury out.)

THE COURT: We will take a brief recess, about 10 or 15 minutes, then we will deal with the issue of jury instructions.

MR. BRINDLEY: Yes, your Honor.

THE COURT: This will give you more time to see if you can resolve any remaining disputes.

MR. LEE: Yes, your Honor. Thank you.

(Recess.)

THE COURT: The government earlier submitted its proposed jury instructions and verdict form.

MR. BRINDLEY: Your Honor, if we can wait until the defendant comes out. He's still back in the lock-up. So I suppose he needs to be present, unless your Honor doesn't want him present.

THE COURT: If you want your client here for this, he may be here.

MR. BRINDLEY: All right.

(Defendant in.)

THE COURT: The defendant is present.

I have the government's proposed set.

Has the defendant submitted its proposed set?

MR. BRINDLEY: I have submitted a proposed set, your Honor. I'll give you the set that I submitted.

THE COURT: Hand it up, please.

MR. BRINDLEY: I think we have some agreements that will negate most of these instructions, however, that the defense is submitting.

THE COURT: Are any of the defense instructions from the pattern instructions of the Seventh Circuit committee?

MR. BRINDLEY: Yes, your Honor. Defense No. 1 is pattern 5.11.

THE COURT: Any other?

MR. BRINDLEY: I don't believe that any of the other defense instructions are pattern instructions.

However, other than No. 2, I believe we will be withdrawing all the rest of the defense instructions in light of the government's decision to withdraw one of its instructions.

MR. LEE: Yes.

THE COURT: All right. So is it then that there is one jury instruction --

MR. LEE: There are just two issues, I think.

THE COURT: -- that's been challenged?

What's the number?

MR. LEE: Defense instruction -- well, actually No. 1, there is slight issue there. And defense instruction No. 2, which we oppose. I think that's actually at this point --

MR. BRINDLEY: That's going to be --

MR. LEE: We have withdrawn the other objections to instructions that we have had some disagreement about.

MR. BRINDLEY: That's correct. So the only ones that would remain are these two issues, your Honor. A partial issue with respect to -- what I will call a partial issue with respect to 5.11, Defense 1, and then an issue from the government with respect to Defense No. 2.

THE COURT: All right. I'm looking now at defense instruction No. 1. Are both paragraphs from Seventh Circuit Pattern Instruction 5.11?

MR. BRINDLEY: Yes.

THE COURT: So that's literally 5.11?

MR. BRINDLEY: There is two parts to 5.11, your Honor. There is a part A and part B. This is part B and the bracketed language from part A.

The reason I have included both part B and the bracketed language from A is because in the note it indicates that the bracketed language should be given in cases involving conspiracy or RICO. So it's my position that the bracketed language should be given along with part B which is obviously relevant.

THE COURT: What is the government's alternative instruction to the defendant's 5.11 as it has been created?

MR. LEE: We propose that we just use both paragraphs of A.

THE COURT: What is your alternative instruction?

MR. LEE: The defendant's presence at the scene of a crime and knowledge --

THE COURT: The number, the number.

MR. LEE: 5- point -- we don't have an instruction in our --

THE COURT: You don't have an alternative?

MS. TRIVEDI: We have not submitted an alternative, your Honor. We think if you were to put in a mere presence instruction then it would be appropriate to go A in its entirety rather than picking a part from A and a part from B. The committee comment states in the first sentence, "as a general rule, A and B are alternative instructions."

THE COURT: And so the defendant has offered alternatives?

MS. TRIVEDI: So he has offered part of part A and part of part B rather than offering A in its entirety or B in its entirety.

MR. BRINDLEY: I think I have offered B in its entirety and part of part A.

MS. TRIVEDI: Oh, I'm sorry. That's true, yes.

MR. BRINDLEY: Yes. The bracketed language from A I have offered because there is a note indicating it's appropriate in conspiracy cases. I have offered the entirety of part B.

MS. TRIVEDI: Your Honor, would it help if I --

THE COURT: What does the instruction say, I mean, the comment, committee comment?

MS. TRIVEDI: The committee comment says, "As a general rule, A and B are alternative instructions. The bracketed paragraph in A may be used as additional or substitute language in cases involving charges of conspiracy, RICO, or CCE. It is the committee's position that the presence instruction should be used in a limited fashion," and then it goes on to talk about A specifically.

And B if you look on the next page, 87, at the top it says, "The instruction A is most often given in conspiracy." And then if you go further down it says, "But instruction B has been given by Judges in this district for many years," and -- yeah.

THE COURT: But the government has, has it not, submitted an instruction with respect to conspiracy?

MS. TRIVEDI: Yes, sir.

THE COURT: What is the number? Is the instruction number --

MR. LEE: Beginning with government instruction No. 22.

THE COURT: All right. No. 22 and then No. 23. And No. 24 and 25, and 26, 27, and 28.

So these several instructions adequately deal with

the law regarding conspiracy.

So let us be more specific in terms of defense instruction No. 1. To what language does the government object?

MR. LEE: We object to, as Miss Trivedi said, using part of A in conjunction with the entirety of B. We would just prefer that we just use the entirety of A with the bracketed language there.

THE COURT: And that ordinarily, the comments say, is the way it is done.

MS. TRIVEDI: The comment says the instruction A is most often given in conspiracy.

MR. BRINDLEY: Your Honor, the comments, if I remember them correctly, also indicate that part B is commonly given in situations in which it is relevant.

The language from part B says, "If a defendant performed acts that advanced a criminal activity but had no knowledge that a crime was being committed or was about to be committed, those acts alone are not sufficient to establish the defendant's guilt."

Obviously, that is very relevant in this particular case because he was driving a car and there has been conflicting evidence about whether he knew what was hidden in that car or whether he didn't. So part B is very much relevant and should be given.

It is my position that since the note also indicates that the bracketed language should be given in conspiracy cases, that the bracketed language is also appropriate. It says it can be given as an additional or a supplement to another part of the instruction, be it A or B. That's my position. Consequently --

THE COURT: What are you saying -- what acts did your client perform that advanced the criminal activity?

MR. BRINDLEY: He drove the car that was found to be containing the money in the invisible hidden trap compartment. And by driving the car there, according to the government's theory, he was providing the money which was obviously going to advance the transaction. It's our position he didn't know that his cousin had put the money in the car. Consequently part B is relevant.

THE COURT: Well, the other theory that you have advanced is that your client stepped into the shoes of Mrs. Perez who was going to pick up her husband from the commission of a crime and that your client decided that he would drive the car to pick up Perez from the commission of the crime.

When Mrs. Perez, according to her testimony, said she refused to go and pick him up after he committed the deed that she tried to talk him out of in the presence of the defendant, that it was the defendant who said, I'll go pick him up and

went to get him.

MR. BRINDLEY: Your Honor, Mrs. --

THE COURT: Participating or aiding and abetting or conspiring to do so.

MR. BRINDLEY: Mrs. Perez did not say at any time during her testimony that she heard her husband ever talk about what he was going to do, just that she didn't want him to leave and he did leave, that's all that she said. She certainly never said that she had any -- in fact, she said she didn't know where he was going. And that after he left, she asked the defendant if he would go and pick him up, as Mr. Perez requested. That's what the evidence was.

THE COURT: Well, the jury will decide what the evidence was. But one version of it was that Mrs. Perez in a small room, relatively small apartment, argued with her husband, tried to talk him out of doing something, and said certainly she would not pick him up.

But that he left, according to her, and your client, who heard it all, was then inclined to go to pick up Mr. Vasquez so that Mrs. Perez would not have to do so or having refused to do so.

The theory would be that if Mrs. Perez tried to talk her husband out of committing a bank robbery and said that she would certainly not go to pick him up after he would do so, but somebody else said not to worry, I'll go pick him up, that that

person would be involved in the bank robbery or accountable or aiding and abetting to do so.

But to return to the original question, it says, "if a defendant performed acts that advanced a criminal activity.".

So you are saying your client performed an act that advanced the criminal activity by driving a car to the drug scene wherein the $23,000 was found in the car.

MR. BRINDLEY: He drove the car and they said that the money was found inside it. That is accurate.

THE COURT: All right. And then it goes on to say, "but had no knowledge that a crime was being committed."

MR. BRINDLEY: Right.

THE COURT: "Or was about to be committed."

MR. BRINDLEY: Right.

THE COURT: "Those acts alone are not sufficient to establish a defendant's guilt."

MR. BRINDLEY: Right. And we intend to be presenting argument and have presented argument throughout the trial that the facts don't establish knowledge.

THE COURT: So you're using the cab driver defense. Which is to say, you call the cab and say, go pick up Mr. Perez. Cab driver went to pick him up, and then under those circumstances, the cab driver could say, if a cab driver performed acts that advanced a criminal activity, but had no knowledge that a crime was being committed or was about to be

committed, those acts alone are not sufficient to establish the cab driver's guilt.

MR. BRINDLEY: That's accurate, yeah.

THE COURT: Okay. Any further argument on the point?

MR. LEE: No, your Honor.

THE COURT: All right. This instruction 5.11 will be given over objection and should be included within the sequence of government instructions dealing with conspiracy generally. I guess there are four or five of them, so this would be included within that set.

MS. TRIVEDI: Yes, your Honor.

MR. LEE: Yes, your Honor.

THE COURT: What is the next issue?

MR. LEE: The government objects to defense instruction No. 2. This instruction concerns the evidence about flight, about Mr. Vasquez's flight from law enforcement.

THE COURT: Do you have an alternative?

MR. LEE: We think there should be no instruction at all.

THE COURT: No instruction on flight?

MR. LEE: Yes. The Seventh Circuit committee actually recommends this. I direct you there. It's -- it is -- I'm sorry, your Honor, on 3.20 flight, there is an instruction there. The committee comment there is that "The committee recommends that no instruction be given on the

subject. Evidence of flight in appropriate circumstances is a relevant circumstance evidencing a consciousness of guilt. Any argument based upon it is proper, but the facts of flight are frequently contested and their relevance frequently disputed. An instruction on the subject gives undue weight to a particular piece of evidence which the committee feels should be avoided."

THE COURT: Let me re-read defense instruction No. 2.

(Pause.)

THE COURT: Well, apparently the last case in the Seventh Circuit dealing with this, according to Mr. Brindley, was in 1994, some 15 years ago. So apparently --

MR. BRINDLEY: Yes, your Honor.

THE COURT: So apparently Judges have been ruling consistent with the commentary in the pattern instructions.

So --

MR. BRINDLEY: Your Honor --

THE COURT: -- make your case, make your argument.

MR. BRINDLEY: My argument is simply this: In this case in which flight is obviously a substantial issue, it's our position that the instruction that I have prepared accurately reflects the law of the Seventh Circuit that we actually dealt with in detail when we were here on the motion in limine before your Honor and you went through the factors with us at that time.

This instruction accurately reflects what the Seventh Circuit has said on the issue of flight. I don't think there is any prejudice to be found by giving this instruction in a case that involves flight so prevalently.

THE COURT: Now, with respect to the flight issue here, the dog got Mr. Perez, is that right?

MR. LEE: The dog with Officer Sullivan, yes, your Honor.

THE COURT: The dog and others got Mr. Perez.

MR. LEE: Yes.

THE COURT: And Mr. Vasquez was taken into custody without the aid of the K-9?

MR. LEE: That's right, your Honor.

THE COURT: But the jury has heard a great deal in the government's evidence regarding the circumstances of the cars striking one another, leaving the lot, going down the expressway, the chase, McDonald's, the dog, evidence of aerial views, and several witnesses recounting the circumstances at the time the deal went down, so to speak.

So I am aware that this instruction is not routinely given, but I do think in this case it would serve the interests of justice to have the jury understand the concept and understand the law as appertains to flight-type evidence. And there was indeed flight in this case. And this ruling would be consistent with what the Court said earlier, as Mr. Brindley

has already mentioned.

I can see no harm that would come from it. It does adequately state the law and fits the circumstances and should be given within the context of the entirety of the instructions. And will be given.

MR. BRINDLEY: Thank you, your Honor.

MR. LEE: Your Honor, if I may on this issue?

THE COURT: Yes.

MR. LEE: The government would ask if you do want to give a flight instruction, perhaps we can just give the first paragraph. I believe the second paragraph -- the first sentence of the second paragraph I believe gives undue weight to a particular type of evidence, this flight evidence, and I believe that this four-part test, while it does state the law in the circuit, I believe that it may be confusing without some examples, which I believe we have been familiar with from the case law, but I don't want --

THE COURT: You'll have room to argue the significance of this flight evidence in the closing argument. But as I earlier recounted, the government spent a lot of time and effort on this flight evidence.

MR. LEE: Yes, we have.

THE COURT: We have heard about it from several witnesses. There were different aerial views. We have used the laser beam. The government knows about the dog. And so if

all of that had not occurred during the course of the trial, then the better argument might be made that it was being overemphasized in an instruction.

This isn't someone who just decided to leave the 7-Eleven store quickly with a loaf of bread. There is a little bit more involved here and the jury has heard a great deal of it.

So I think it should be given in its entirety. And of course, how much time the government wants to spend on it in closing argument will be up to the government, and of course the defense will have a similar opportunity.

If you think it's necessary to dwell on it, that it's important to the case, then you may do so. On the other hand, if you want to play it down, so to speak, or not emphasize it, that's a matter of strategy. So it will be given.

MR. BRINDLEY: Thank you, your Honor.

MR. LEE: Thank you, your Honor.

MR. BRINDLEY: That concludes all of our disagreements, your Honor.

THE COURT: So what I need now then is a complete --

MR. BRINDLEY: Oh, wait, your Honor. There is one other issue. I forgot.

In terms of the instructions there is no other issue. However, the defense has also submitted alternative verdict forms which I always submit, and Judges use them sometimes and

sometimes they do not.

The difference in my verdict form substantively is that with respect to each one of the counts, my verdict form indicates not guilty on the left and guilty on the right. I believe that's in accord with the burden of proof as one reads from left to right. So I always offer those and I offer them in this case.

THE COURT: Has the government given its ordinary verdict forms without reference to right and left and up and down and so on?

MR. LEE: I believe the verdict form we submitted was the standard one.

THE COURT: I will use the standardized version submitted by the government. The one thing we know that this has been tested over the years and I have yet to see a case in which the verdict form submitted by the government was rejected or erroneous or something wrong with it because it has something on the right and not on the left.

But it doesn't hurt to try, Mr. Brindley, but this is the tested way to do it, and the government's version will be given.

MR. BRINDLEY: Thank you, your Honor.

MR. LEE: Yes, your Honor. Then we will prepare a final set. We will also be adding, I believe, one more instruction about the summaries that were stipulated to.

MR. BRINDLEY: Yes. It's a pattern.
THE COURT: The 1006 summary?
MR. BRINDLEY: Yes.
THE COURT: Right. Okay.
So give me a clean set tomorrow.
MR. LEE: Yes.
THE COURT: That I will read to the jury and then give to the jury, as well as a clean indictment.
MR. LEE: Yes, your Honor.
THE COURT: Okay. Two counts.
MR. LEE: That's right, your Honor.
THE COURT: Okay. See you at 10:00.
MR. BRINDLEY: Thank you, your Honor.
MR. LEE: Thank you, your Honor.
(Proceedings adjourned at 4:30 p.m. to 10:00 a.m.)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	No. 08 CR 625-3
vs.	)	Chicago, Illinois
ALEXANDER VASQUEZ, JR.,	)	
Defendant.	)	September 2, 2009 10:00 a.m.

VOLUME 6
TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE CHARLES R. NORGLE, SR.
AND A JURY

APPEARANCES:

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(Proceedings in open court. Jury out.)

THE COURT: All right. The Court has been informed that all the jurors are here. Is your client available?

MR. BRINDLEY: He is not. The marshals are not here yet, Judge.

THE COURT: All right.

(Discussion off the record.)

MR. BRINDLEY: If you're ready for us, Judge, we can proceed.

THE COURT: Well, if you need to talk to your client, go ahead.

MR. BRINDLEY: Let me talk to him for just a minute, Your Honor.

(Recess.)

THE CLERK: 08 CR 625, United States of America versus Alexander Vasquez, Jr.

THE COURT: All right. The defendant is personally present. What is the status of the case?

MR. LEE: Your Honor, as we left things off last night, we were -- we wanted to give Joel Perez the night to reconsider his decision to refuse to testify. Mr. Perez is here across the hall. We've left several messages for Mr. Lipuma, Mr. Perez's counsel, about the developments. We left messages last night as well as messages this morning. We have not heard back from him. My understanding is that

Mr. Perez would like to talk to his lawyer before making a final decision.

MR. BRINDLEY: Your Honor, at this point the Government has been given multiple delays to prepare its the case, and we have been cooperative with all of those delays. We have now completed every stage of the trial, including the jury instructions conference, Your Honor.

In light that the Government does not have its witness in a position where he's going to testify for them, they had the opportunity yesterday. He was asked multiple times and gave his opinion to the Court. If they are no longer -- and he had opportunities to understand the situation. The Court instructed him on the situation. So at this time it is the defendant's position that we need to move forward unless the Government is prepared to call their next witness.

THE COURT: So you're suggesting I should deny the request of Mr. Perez to speak with his attorney?

MR. BRINDLEY: No, I'm suggesting that you would deny the Government any further continuance with their rebuttal case. The jurors are all here, and we need to get this case concluded.

THE COURT: All right. The objection is overruled, and we'll pass the case for some brief period of time to permit Mr. Perez to speak with his attorney.

MR. LEE: I will try calling Mr. Lipuma again.

THE COURT: Okay.

MS. TRIVEDI: Thank you, Your Honor.

(Recess.)

THE COURT: All right. Defendant is personally present. Please ask Mr. Perez to come in.

(Brief pause:)

THE COURT: Are you Joel Perez?

DEFENDANT PEREZ: Yes, Your Honor.

THE COURT: Have you been in touch with Mr. Lipuma this morning?

DEFENDANT PEREZ: No, sir.

THE COURT: When was the last time you saw him?

DEFENDANT PEREZ: Yesterday evening.

THE COURT: All right. What I'm going to do is to appoint an additional attorney to represent you. Mr. Lipuma was appointed by the Court. He will remain as your attorney, but I'm going to appoint an additional attorney. For one reason or another, Mr. Lipuma is not here. There's no explanation for his absence. He was not ordered to be here, and in any event he is not here.

I don't intend to deal with you directly without having an attorney standing at your side. So Mr. Fulbright will immediately get in touch with the Federal Defender's office to tell them to have an attorney come to see you immediately.

In the meanwhile, we have the jury waiting, and so what I intend to do is this. I'll say that at 12:30 the Government should be ready to call its next witness, if any. If no witness is available or for one reason or another cannot be called, then we will proceed to closing arguments, after which the Court will read the instructions. Then the case will be available to the jury for deliberations.

So that's where we stand. I think as a courtesy, if nothing more, I would ask that the jurors be brought in so I can tell them of the schedule without going into the details here, obviously.

All right. So, Mr. Perez, you can leave the courtroom.

MR. BRINDLEY: Your Honor, if I can make one point for the record, I believe that Mr. Perez's attorney, Mr. Lipuma, was retained counsel, which would make a difference in terms of choice of counsel issues. Just for the record, I want to make sure Your Honor knows that if you appoint someone else.

THE COURT: Well, we can double-check that, but in any event I'm not replacing under any circumstances Mr. Lipuma. I would be adding counsel under these extraordinary circumstances to see to it that the rights of Mr. Perez are protected. At the same time, the interests of justice require that this case proceed to a conclusion.

MR. BRINDLEY: Yes, Your Honor.

THE COURT: So we will double-check to see whether he is privately retained or court-appointed, but it will not change the fact that I am directing that the Federal Defender have an attorney here under these extreme circumstances to confer with Mr. Perez. It is approximately 11:15. As I've said, we would direct the jury to come back at 12:30, at which time a witness would be called or we'll proceed to closing arguments.

MS. TRIVEDI: Your Honor, could I ask a question? Would it be possible to --

THE COURT: Would you stand by a microphone? I can't hear you.

MS. TRIVEDI: Would it be possible to not inform the jury as to whether or not a witness will be called or whether there will be closings and just simply let them know that we'll be back at 12:30?

THE COURT: What's the objection?

MS. TRIVEDI: Just so they're not wondering.

THE COURT: What is your position, Mr. Brindley?

MR. BRINDLEY: My position is they're probably going to be wondering no matter what as they are sitting back there. Your Honor, my position is that the Court can just instruct them that at 12:30, you know, exactly what the Court said, that we will either hear another witness or we'll go into closing

arguments at that time.

THE COURT: I don't see how anything prejudicial could come from that. Another alternative would simply be to say to the jury: You may leave and come back at 12:30, at which time the trial will continue.

MR. LEE: That would be our preference, Your Honor.

THE COURT: What is your position?

MR. BRINDLEY: My position is that we should tell the jury what Your Honor proposed the first time. We should tell them at 12:30 the jury will hear either another witness or hear the closing arguments in this case. These jurors have been sitting all this time, and I'm sure they're wondering. I think we need to let them know that there's light at the end of the tunnel, Your Honor.

THE COURT: I don't think it is of special significance one way or the other, so I will say what I said originally.

MR. BRINDLEY: Thank you, Your Honor.

(Jury in.)

THE COURT: All right. Good morning, members of the jury. I told you yesterday that there was every reason to believe that this case would be yours for deliberations today. That remains true. However, you will be excused now -- call it a brunch -- until 12:30. At 12:30, you will either hear an additional witness or you will hear the closing arguments. In

any event, the case will be yours for deliberations today during the course of the day. So enjoy this brunch and come back at 12:30. You are excused until then.

(Jury out.)

THE COURT: The jury has left the room. Court is in session. It is important that Mr. Perez remain in the area. If he's taken back to the MCC, that could present other problems in terms of delay. So he should be immediately available to the Federal Defender for consultation.

I want to re-emphasize that I'm not replacing Mr. Lipuma. I'm simply adding an attorney. That attorney, of course, will have the right to be heard with respect to the immediacy of this action by the Court.

So, Mr. Fulbright, if you have not already done so, get in touch with the Federal Defender. We need an attorney to confer with Mr. Perez expeditiously.

MR. LEE: Yes, Your Honor. We will keep Mr. Perez in the witness room across the hall. Also, I would note that Mr. Paul Flynn of the Federal Defender's office does represent Mr. Cruz, who was a co-defendant originally in this case. So obviously there's no one else that would be a --

THE COURT: Well, I don't want to overly complicate matters. I've said only what I've said.

MR. LEE: Thank you, Your Honor.

(Luncheon recess.)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	No. 08 CR 625-3
vs.	)	Chicago, Illinois
ALEXANDER VASQUEZ, JR.,	)	
Defendant.	)	September 2, 2009 12:30 p.m.

VOLUME 6
TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE CHARLES R. NORGLE, SR.
AND A JURY

APPEARANCES:

For the Government: MS. KRUTI D. TRIVEDI
MR. STEPHEN CHAHN LEE
(United States Attorney's Office,
219 South Dearborn Street, 5th Floor,
Chicago, Illinois 60604)

For the Defendant: MR. BEAU B. BRINDLEY
MS. BLAIR T. WESTOVER
(Law Offices of Beau B. Brindley,
53 West Jackson Boulevard, Suite 1605,
Chicago, Illinois 60604)

ALSO PRESENT: Mr. John A. Meyer

PATRICK J. MULLEN
Official Court Reporter
219 South Dearborn Street, Room 2128,
Chicago, Illinois 60604
(312) 435-5565

(Proceedings in open court. Jury out.)

THE COURT: Mr. Meyer, step up, please.

MR. MEYER: Yes, sir.

THE COURT: The record should reflect that Mr. Lipuma is a privately retained attorney. He has not been available this morning. We have waited since 10:00 o'clock, and it is now a minute or two past 12:30. Mr. Lipuma has not appeared. The Court did appoint the Federal Defender as an additional attorney in the case. Have you had an opportunity to confer with Joel Perez?

MR. MEYER: Judge, I have. First of all, you know, he confirmed that Frank Lipuma represents him in this matter and that Frank Lipuma was here yesterday when I guess there were some preliminary discussions about this matter. Mr. Perez would like to have the ability to consult with Mr. Lipuma before he makes a decision concerning testifying here today.

I've come into the case without any background knowledge of prior proceedings or the facts of the case, so I am somewhat handicapped as far as advising Mr. Perez on the course of action he should take here.

THE COURT: I understand your position. I simply wanted to provide the opportunity, and from what you say, Mr. Perez insists that he should have the opportunity to deal with counsel of his choice. I will respect that; however, the Court can wait no longer. The case was set for a continuation

of the trial at 10:00 o'clock. It is past 12:30, and Mr. Lipuma is not available.

So I appreciate that you have come in, and you are no longer required to be here under any capacity. Once again, thank you for your appearance. You are excused.

MR. MEYER: Judge, you know, if necessary, if Mr. Perez wanted to consult, I can remain if he wants to consult.

THE COURT: From what you say -- and I accept what you have said -- he wants his privately retained counsel, Mr. Lipuma, which is to say that he rejects your acting in his behalf. I accept that position. Mr. Lipuma certainly knows the circumstances here. He made a statement to the Court yesterday before Mr. Perez ultimately decided that he did not choose to testify. The Court found that he was in civil contempt and ordered him to remain in custody until further order of the Court. So that's the status of matters.

MR. MEYER: Judge, could I just clarify one thing? I don't want to represent to the Court that Mr. Perez has rejected my representation of him for these purposes. His statement to me was that he preferred Mr. Lipuma to be representing him.

THE COURT: Well, let's deal with it this way. Please ask Mr. Perez to step in.

MS. TRIVEDI: Your Honor, I believe Mr. Lee is

talking to Mr. Lipuma on the phone at this time.

(Discussion off the record.)

MS. TRIVEDI: Your Honor, would it be possible for us to break for five minutes to allow Mr. Lipuma to talk to Mr. Perez over the phone?

THE COURT: Yes.

MS. TRIVEDI: Thank you.

MR. MEYER: And I'll stand by, Judge.

THE COURT: If you wish.

(Recess.)

THE COURT: All right. Mr. Fulbright, please direct the marshal to bring in Mr. Perez now.

(Brief pause.)

THE COURT: Did you ask the marshal to bring in Mr. Perez?

THE CLERK: Yes, I did.

THE COURT: What happened?

THE CLERK: They're getting him. I don't know why they're hesitating.

(Brief pause.)

THE COURT: Are you Joel D. Perez?

DEFENDANT PEREZ: Yes, Your Honor.

THE COURT: Did you talk to Mr. Lipuma?

DEFENDANT PEREZ: Yes, Your Honor, we spoke.

THE COURT: What have you decided to do?

DEFENDANT PEREZ: Well --

MR. MEYER: Judge, I spoke with Mr. Lipuma also, and Mr. Lipuma advised me that he's been in the Kankakee County Jail since 7:30 this morning. He just left and is still in Kankakee, but I guess he's on his way returning to Chicago.

THE COURT: Did you talk to Mr. Lipuma?

DEFENDANT PEREZ: Yes, Your Honor.

THE COURT: What did he tell you to do?

DEFENDANT PEREZ: Well, he just told me we already agreed on the situation yesterday.

THE COURT: He told you to do today the same thing you did yesterday?

DEFENDANT PEREZ: Yes, Your Honor.

THE COURT: All right. You are excused. You'll remain in civil contempt.

Bring in the jury.

(Jury in.)

THE COURT: Good afternoon, members of the jury. It's about 12:42 p.m. The Government may proceed.

MR. LEE: Yes, Your Honor. At this time, the Government rests its rebuttal case.

THE COURT: Yes. You may proceed.

CLOSING ARGUMENT ON BEHALF OF THE GOVERNMENT

MS. TRIVEDI: When the defendant drove drug money to a drug deal, he knew what he was doing. When he got to that

drug deal and waited for the cocaine broker, Carlos Cruz, with his partner and buyer, Joel Perez, when he waited for a kilogram of cocaine, he knew what he was doing. When the defendant heard the siren, saw the lights, heard the sound of police approaching, then decided at that point to slam his car into two Arlington Heights police cars and flee into oncoming traffic and lead the police on a wild chase, he knew what he was doing.

The evidence is clear, ladies and gentlemen, that the defendant, Alexander Vasquez, knew exactly what he was doing on August 5th, 2008, prior to his arrest. He was working with Joel Perez to get a kilogram of cocaine. When it became clear that he wasn't going to get that kilo and instead that he was going to get arrested, he ran. That is why we're here today.

Soon the Judge will instruct you on the law in this case. I'm going to take a little time now to talk to you about the law and the evidence and how the evidence shows that the defendant, Alexander Vasquez, is guilty beyond a reasonable doubt of the crimes with which he's been charged.

That's the standard, ladies and gentlemen, beyond a reasonable doubt. It's the same standard that's applied in courtrooms all over our country for the last 200 years. We embrace that burden, and the evidence you've seen and heard shows that the defendant is guilty beyond a reasonable doubt as to both counts with which he's charged.

You'll be presented with an indictment in this case. An indictment is a framework. The indictment isn't evidence, but it can guide you. The indictment in this case has two counts. Count 1 of the indictment, the one we'll talk about first, charges the defendant with conspiring with others to possess with intent to distribute a controlled substance. The second count in the indictment charges the defendant with attempting to possess that controlled substance, in this case a kilogram of cocaine, with the intent to distribute it.

One important thing before we delve into the case, the Judge, I expect, will instruct you that when you're thinking about this case, you should use your common sense. Keep that in mind. As you go over all the events that led up to the defendant being arrested, as you think about all of his actions and everything surrounding those actions, use your common sense. When you use your common sense, it becomes clear that the defendant is guilty of both of the crimes with which he's been charged.

Let's start by talking about the conspiracy charge. I expect Judge Norgle will instruct you that conspiracy is simply an agreement to commit an illegal act. It's an agreement between two or more people to commit a crime.

Now, remember, since we're talking about conspiracy and we're talking about illegal acts, there isn't going to be a written contract. There's not going to be a formal agreement.

There's not going to be explicit language necessarily. The agreement then is really two or more people working together for the common goal, in this case to get that kilo of cocaine.

The defendant doesn't need to state any magic words to be in a conspiracy with Joel Perez and Carlos Cruz. He doesn't need to know everything that happened. He doesn't even need to know every member of the conspiracy. He just needs to agree, to agree to commit a crime, in this case to possess cocaine with the intent to distribute it.

To prove conspiracy, I expect the Judge will instruct you that the Government must prove two things and two things only: first, that the conspiracy as charged in the indictment in Count 1 existed and, second, that the defendant knowingly became a member of the charged conspiracy with an intention to further the conspiracy.

The conspiracy charged in this case is straightforward. Cruz, Perez, and the defendant all shared one goal. They wanted that one-kilogram deal that was taking place in Arlington Heights to be completed. The defendant's actions as well as the other evidence in this case make clear that the conspiracy existed and that the defendant agreed to be a part of the conspiracy, to be a part of that one-kilogram deal that was supposed to take place on August 5th in Arlington Heights.

Now, each person in this conspiracy had his own role. Carlos Cruz, he was the broker. He told you when he was on the

stand that he was the one they would connect with, that he was the one who had a tie to a person that he thought would be able to get them a kilogram of cocaine.

When we talk about Carlos Cruz and what he told you, keep one thing in mind. I expect the Judge to instruct you that you should consider the testimony of Carlos Cruz with caution and great care. Ladies and gentlemen, you should absolutely do that. When you do, you'll realize that Carlos Cruz was telling you what actually happened on August 4th and August 5th, 2008, because what Carlos Cruz says was corroborated. When you look at what Carlos Cruz says, it makes sense with every other piece of evidence the Government presented in this case.

Now, Carlos Cruz, he tells you that he is the broker, and he tells you that he contacts the confidential -- who you learn later is the confidential source to arrange the deal. You heard some of the transcripts of some of the calls setting up the deal between Carlos Cruz and the broker, so you have a sense of the plan and how Carlos Cruz was supposed to get the kilo. Carlos Cruz is supposed to get the kilo of cocaine to make the deal happen.

Joel Perez had his own role in the conspiracy. He was the one between the defendant and Perez who was the public face of their partnership. The defendant and Perez, you know, wanted to get a kilogram of cocaine, and so they went to Cruz,

the broker. Like I said, Perez was the public face. He was the one who was on the calls with Carlos Cruz. He was the one who showed up at the meeting and met with the confidential source. That was Perez's role.

Cruz and Perez were there for one reason and one reason only, to do a cocaine deal. The defendant, he was there for that very same reason. The evidence makes clear that the defendant had a specific role, too, and you know what that role was. His job was the person bringing the money. He was supposed to make sure that that $23,000 got to Arlington Heights when it was supposed to without any hitches. That job was critical, ladies and gentlemen. Remember, without the money, the deal couldn't have gone through.

The roles of the people in this conspiracy are another thing that's helpful to think about as you think about the evidence because the roles help explain why people did certain things and why they didn't do other things. So keep that in mind as you think about the evidence.

Now, the evidence clearly shows that a conspiracy or an agreement existed to buy one kilo of cocaine. I'm going to talk to you now more about the evidence that shows that the defendant knowingly became a member of the conspiracy with an intention to further it.

How do you know that the defendant knowingly participated in this conspiracy? You know it from his own

actions. When you study those actions in the context of all the other evidence that you've heard, in the context of the phone records, the car records, the surveillance, the testimony, when you look at it in light of all the facts and all the circumstances surrounding this case, it's clear that the defendant knowingly participated in this conspiracy.

The evidence of what happened before the defendant met with Perez and Cruz, for example, makes clear what happened. The evidence of what happened at the Denny's parking lot also makes clear that the defendant was part of the conspiracy. He was there for one reason and one reason only, because he was a part of that plan to get the kilogram.

One of the ways that you know the defendant was a part of the conspiracy and that he knowingly participated in the conspiracy is because he shows up at the Denny's that day in the Bonneville with the hidden compartment with $23,000 stashed inside. Let's break that down and talk about how each of those facts show you that the defendant is a knowing member of the conspiracy.

First of all, the defendant is in precisely the right place at precisely the right time. The precise place he's in is the Denny's parking lot. You've heard about that Denny's parking lot, and you know that it's a place that's close enough to deliver money for the deal.

You know that the spot where he's parked is a good

spot to park because, as Agent Chupik told you, when he accidentally got too close to the deal, when he accidentally drove to a place in the Denny's parking lot that was very close to the Shell, he could see everything that was going on at the Shell. The defendant is in the precise place he needs to be to do his job.

Not only is he in the right place, the defendant arrives at precisely the right time. He arrives when he is needed, when the money guy needs to be there. How is the defendant able to do that? Because the defendant is in on the plan.

The phone records show that the defendant was in frequent contact with Perez on August 4th and August 5th of 2008. Based on what happens next, you know what those calls are about. They're about setting up the deal and making sure that the defendant gets the money to where it needs to be to make the deal happen. This is a precise matter, ladies and gentlemen, and the phone records make clear just how precise it is.

When you think about the phone records, think about what they tell you. You can see when Perez gets picked up by Cruz. They have a series of calls, Perez and Cruz. Then after about 5:03, the phones between Perez and Cruz are silent. Why are they silent? They're in the same car. They're on their way to Arlington Heights.

Perez's phone isn't entirely silent, however. The next call you see is a call between Perez and the defendant just about two minutes later, after Perez gets picked up, at just at the right time to let the defendant know that Cruz picked up Perez and the two of them are on their way to the deal.

Then you see a series of calls. In each instance, you see that the source talks to Cruz and then Perez talks to the defendant. Again, it makes perfect sense. Cruz is talking to the source, and they're figuring out the plan, the logistics and how they're going to end up meeting to do the deal. Then Perez is relaying that information to the defendant. The defendant needs to know because he's a critical part of the deal.

Then the records go on, and after the 5:29 call Perez meets with Cruz. He meets with the source. After that call, you know what happened. Perez walks across to where the defendant is waiting, waiting because he's been in close contact with Perez, waiting because he needs to be there with the money in order for the plan to work.

Common sense tells you that this isn't just about getting a ride. The pattern is clear. Pay attention to the pattern. The pattern lets you know that Perez is keeping the defendant abreast of developments to help make sure the deal goes smoothly, which makes sense. If the defendant and Perez

are doing a drug deal, they want to minimize the amount of time it takes. After all, the quicker the deal, the less likely they are to get caught. So they arrange for the defendant to be at the right place at the right time.

So we just talked about how the defendant shows up at exactly the right place at the right time to complete the deal. How else do you know that the defendant is a knowing participant in the deal? Well, you know how the defendant shows up to the deal, and that also makes clear that he knows what's going on.

The defendant arrives in a black Pontiac Bonneville. Ladies and gentlemen, you've heard a fair amount about that black Pontiac Bonneville, so let's take a minute to talk about the car. You know based on the documents and the testimony of Agent John Dunleavy that the car was sold. The car was sold from John Dunleavy, and who it was sold to in actuality was the defendant and Perez.

You also saw a paper trail of the car's ownership going from Dunleavy to Perez and to the defendant's daughter, Mayra Vasquez. Common sense tells you that if you're going to be the driver of a drug car, you're not going to put that car in your name. But you know that the defendant is connected to the car. You know the defendant and Perez bought the car together. John Dunleavy told you that they were there together. They arrived together. They both checked out the

car, and they left with the car.

You know that the false names used were names of family members, family members who weren't going to report them if they found out that they were using their names. Most importantly, you know the defendant is connected to the car because that's the car he drives to the deal. He doesn't take other cars you haven't heard about. He takes that car, and he takes that car for a reason. The reason is he's clear as to what's going on.

That car, as you heard from Agent Chupik, has a hidden compartment or a trap in the area where the air bag should be. Why does the defendant choose to drive a car with a trap? Because he's got something to hide, and that something is the $23,000 needed for the deal.

Ladies and gentlemen, for the defendant, the risk isn't something that requires an air bag when he drives there. The risk is something that requires a hidden compartment. So he picks a car that doesn't have an air bag but has a hidden compartment, a hidden compartment that contains the money for this drug deal. He needs to keep the money he's bringing hidden, and presumably had the deal gone through, it makes sense that he would need to hide the kilo. So that's the reason he takes the car that he does.

You know that Perez was part of the deal, and you know that the defendant brings the precise amount of cash

needed to pay for the cocaine at the precise time that he has to. Does it make sense -- think about this -- that Perez was planning on having someone else, maybe his wife, show up in the middle of a drug deal when she has no idea what's going on?

Perez was going to do the deal. You know that. The evidence makes that clear. Perez did not want to get caught doing that drug deal. It simply does not make sense that Perez would insert someone entirely clueless into the middle of this deal, someone who could get in the way, someone who could say the wrong thing, someone who could make a mistake, someone who didn't understand how important it was to show up at the right place in the right car at the right time. Perez isn't going to take that risk. He's in Arlington Heights for one reason and one reason only, to get that cocaine. He needs someone he can count on. That someone is the defendant, Alexander Vasquez.

Now, we've talked about the how the defendant knew what he was doing because of the specifics regarding how he got to the kilo deal, but those aren't the only facts that prove that the defendant knew exactly what he was doing. We can also look at what he does when he gets to the deal.

Once the defendant arrives in the car with the secret compartment at the drug spot with the drug money to do the drug deal, what happens next? He meets with his co-conspirators, Carlos Cruz and Joel Perez. Now, you know that because when Agent Chupik was circling right before the arrest he saw Cruz,

the same guy he saw meet with the confidential source in the Shell lot near the Bonneville in the Denny's lot. Cruz is still there at the spot when law enforcement arrives to make the arrest.

As we talked about a little bit earlier, you know Cruz's role. He's the broker. You know Perez's role. He's Vasquez's partner. He's the public face of the partnership, the one who knew Cruz, the one who's supposed to make sure that the cocaine is good quality.

Why would the defendant meet with a cocaine broker and a cocaine buyer at the spot of the drug deal? Because he is waiting for the kilo of cocaine. He's waiting there. He waits with them because he, like them, wants to get ahold of that kilo. He wants the drugs, and he has the money.

You know the defendant wants the drugs and has the money because the defendant meets with Perez, and you've heard about that meeting. Carlos Cruz, the insider you heard from, tells you what happens at that meeting. Remember, ladies and gentlemen, conspiracies happen in secret. The defendants, they take steps to avoid being caught. So some of the evidence that you're going to get about the conspiracy will be from an insider.

What does Carlos Cruz tell you that lets you know that the defendant was a knowing member of the conspiracy? Well, he doesn't say much, which makes sense given the

defendant's role, but what he does tell you is important. The key thing that he tells you is that Carlos Cruz, meaning himself, Joel Perez, and the defendant all wait in the Denny's parking lot. That, ladies and gentlemen, is completely corroborated.

The fact that the men wait, wait long enough for Agent Chupik to figure out what's going on and make the arrest, shows that the defendant's conduct is knowing. The defendant doesn't leave. Common sense tells you, based on what you know, that's because he's waiting for the kilogram of cocaine. That's what Carlos Cruz told you, and that's what all the other evidence in the case shows.

When the time is right, Agent Chupik gives the arrest signal. Sirens blare, lights flash, police officers and DEA agents on foot run over the median. They're yelling "police." They're wearing badges. Two Arlington Heights police cars pull up behind the defendant's car. In the midst of this sea of pandemonium, in the midst of the police saying they're police and running towards the car, sirens, lights, what does the defendant do? What does Cruz do? What does Perez do?

The reactions make clear that defendant is a knowing part of this conspiracy. Cruz is the one standing outside. When he sees people running at him shouting "police" and wearing police badges and he hears the sirens and sees the lights, what does he do? He puts his hands up, and he's taken

into custody. That's what Cruz does.

In contrast, what does the defendant do? When the defendant is confronted with the police running, with the sirens, with the lights, with the two cars blocking his car, what does the defendant do? He slams his car into reverse and rams into two Arlington Heights Police Department cars. He rams them, and then he leaves. He leaves the parking lot and drives directly into oncoming traffic. All of these actions, ladies and gentlemen, were absolutely intentional and are a sign, a sign of the defendant's guilt in this case due to his role in the drug deal.

The theory or the notion that police cars rammed into him, that's not supported by what you saw actually happen in this case or what you heard actually happen in this case. What the evidence shows is that the defendant wasn't someone who was scared. The defendant was someone who was desperate.

The defendant, after he and Perez flee into oncoming traffic, what do they do? They abandon their car in the Wal-Mart parking lot. It's found later by the police officers, and there's damage on it. They leave their car, and once they leave their car what do they do when they're in the parking lot without law enforcement present? The defendant and Joel Perez run again.

Why do they run? Because they know, they know the police are looking for them. The defendant knows because he's

a part of the drug deal, and so he runs and tries to get as far away from that car as he can.

Not only does he run, but the defendant also hides. Again, this goes to show his knowledge. He knew exactly what was going on on August 5th when he showed up with the drug money in the car with the secret compartment at the drug spot. When the defendant is hiding, you know he's hiding in that McDonald's that you saw in the photo.

When the defendant is hiding there, what does he do? Officer Hayes told you he peeks out the window to see if anyone is following him. Officer Hayes is, in fact, looking for him, and he continues to. The defendant looks out again with a look of surprise on his face.

Then what does the defendant do? The defendant takes off. He runs out of the McDonald's. Why does he run? Because he's about to get caught. He's about to get caught for what he's done. The defendant, he keeps running. He keeps running until he can't run anymore. He runs out of the back door to the McDonald's parking lot, and he runs into Officer Sefton's car.

Officer Sefton told you about that, how he drove a little further when he saw where the defendant was going so that he could cut him off. Officer Sefton told you how he did, in fact, cut the defendant off, and so much so that the defendant runs into the car and then braces himself against the

hood of the car to stop his momentum. He needs to brace himself and stop his momentum because he's running as fast as he can so that he does not get caught for doing that drug deal. So he's there braced against the car.

What does Officer Sefton tell you next? The defendant braces himself against the car and makes a movement as if he's about to run, but the defendant is not fast enough. Officer Sefton, you heard, is already on his way to get the defendant. The car door is opened, he's out in an instant, and he arrests the defendant.

Ladies and gentlemen, these were drastic moves. They were drastic moves by a desperate man, a desperate man that knew that he was about to get caught, that he was about to get caught for his role in the drug deal that was supposed to happen on August 5th, 2008, in Arlington Heights.

Now, in addition to all the evidence we've just talked about, all the evidence that you have that makes clear that not only was the defendant a part of this conspiracy but that he was a knowing part of this conspiracy, you also have a special type of evidence that you can consider for a limited purpose. That's the evidence regarding the defendant's 2002 conviction.

I expect Judge Norgle to instruct you that you may consider this evidence only on the question of defendant's knowledge, intent, absence of mistake or accident, identity,

and modus operandi. You should consider this evidence only for that limited purpose.

So let's focus with a mind to those purposes on the facts of the 2002 case. You heard about those facts. You know what happened. In 2002, the defendant did a drug deal with Joel Perez. At the time, the defendant and Joel Perez used a car that was registered to another member of the Vasquez family, Marilyn Vasquez. That car had a hidden compartment. The hidden compartment was in the dashboard area, inside the dashboard area. In that hidden compartment, the defendant and Joel Perez were storing contraband.

Ladies and gentlemen, as you know in this case, the charges you are considering involve the defendant and Joel Perez going to a drug deal in a car registered to a nominee, this time Mayra Vasquez, a car containing a secret compartment which has money for a drug deal in it. The evidence of the prior 2002 conduct is powerful evidence that the defendant knew exactly what he was doing when he went to the deal in Arlington Heights in 2008.

All of the evidence we've just discussed, ladies and gentlemen, not only does it go to that conspiracy charge I was talking to you about, the first count of the indictment, but it also goes to the second count, the attempt charge. I expect the Judge to instruct you that in order to prove intent -- or attempt, the Government must show, first, that the defendant

attempted to knowingly and intentionally possess a controlled substance, in this case what would have been the kilo, and then, second, that the defendant attempted to possess the controlled substance with an intent to deliver it to another person.

Ladies and gentlemen, everything we've talked about, the defendant's actions in getting to the deal, what the defendant does when he's there, the defendant's flight afterwards when the deal goes bad, all of that supports a conclusion that he was attempting to knowingly or intentionally possess a kilogram of cocaine.

What we've talked about so far also satisfies the second element of the attempt charge, the second thing that the Government has to prove, including the substantial step that the defendant took in bringing the money to the drug deal.

After you've found the defendant guilty on either charges, you'll have to state the amount of drugs that were involved in either crime. It's a straightforward answer. In both cases, the defendant was dealing with a kilogram. That's an amount over 500 grams. So when you see the form, you can just check the box for over 500 grams.

So now we've talked about all of the evidence that you've seen over the course of a couple days which proves that the defendant acted knowingly that the Government presented. Let's talk for just a brief moment about the defendant's case.

Remember, the defendant is not obligated to put on a case. The burden to prove the defendant guilty beyond a reasonable doubt is the Government's burden, and it stays with the Government the entire time.

You should also remember that when the defendant does decide to put on a case, the jury should look at it to see if it makes sense, to see if it's believable. When it comes to Marina Perez, ladies and gentlemen, it's not. According to Marina Perez's story, defendant just ended up in the Denny's parking lot, and she was the reason. She was the one who was supposed to go, and the defendant happened to end up going in her stead.

Well, ladies and gentlemen, you've heard the recordings. You've heard her talk about the deal on those recordings. In those recordings, you don't hear her say: Oh, my God. It's my fault he's in this mess. I was the one who sent him to pick you up.

No. In the recordings, she talks about how the defendant, like her husband, is in deep trouble.

According to Marina Perez's story, the defendant knew nothing about the drug deal he was part of that day but, ladies and gentlemen, that doesn't make any sense. Perez, remember, would not have wanted a clueless person to walk right in the middle of a drug deal. He's a drug dealer. He wants to get the deal done. He has every reason in the world to want the

deal to go off smoothly, and he's just not going to take such a huge risk.

Ladies and gentlemen, Marina Perez's testimony is not believable. I expect the Judge to instruct you that you can consider, among other things, the interest and the bias of Marina Perez when you evaluate what she told you. When you do that, what do you see?

Let's talk about the bias. Well, you learned that Marina Perez has known the defendant for seven years. In fact, through marriage she's related to the defendant. You know the fact that she is next door neighbors with part of the defendant's family. You know the fact that she was a frequent visitor to the defendant's house in August of 2008. You in know short about her close relationship with the defendant and about the bias that comes from that.

You also heard about Marina Perez's state of mind, whether right or wrong, that the defendant's attorney could help her husband with his own case. So you know what her interest is in that matter.

Ladies and gentlemen, all of these factors combined tell you that Marina Perez's story of giving the defendant the car keys on the day of the deal is just that; it's a story. You know what actually happened that day. You know that on August 5th, 2008, the defendant took steps to complete a one-kilogram deal that he had been working on with Joel Perez.

You know that the defendant drove the stash car with the drug money to the drug deal. You know that he showed up precisely when he was needed. You know he showed up with exactly what he needed to bring.

The defendant, as you also know, when he got there, he waited. He waited for the kilogram of cocaine with the other people that were part of the deal. When he realized that the cocaine wasn't going to come and that instead what he was confronted with was law enforcement and lights and sirens, he took off. He tried to escape because he knew he was a part of that deal and he didn't want to get caught.

In short, ladies and gentlemen, the evidence you've seen and heard over the last week proves that the defendant is guilty beyond a reasonable doubt on both of the counts with which he's charged. Thank you.

THE COURT: Mr. Brindley?

MR. BRINDLEY: Your Honor, may I have a moment to set up my presentation?

THE COURT: Yes.

MR. BRINDLEY: Thank you.

(Discussion off the record.)

CLOSING ARGUMENT ON BEHALF OF THE DEFENDANT

MR. BRINDLEY: Ladies and gentlemen, when we began the case, I began the case by talking to you about the one fundamental question that this case is about and the

fundamental thing that this case would be about. That fundamental question was whether or not the defendant, Mr. Alexander Vasquez, actually knew about and agreed to do a drug deal on August 5th, 2008. That was the fundamental question.

Ladies and gentlemen, when I begin now at the end of the trial, what I have to do is start to talk about what this case is not about, because this case has been sidetracked by all kinds of distractions. This case is not about what the defendant did seven years ago at some other time. That doesn't tell you what he did or didn't know on August 5th of 2008. This case is not about what the defendant did after this whole thing was over when he was on parole and drove away from the police. That's not what it's about. This case is certainly not about any of these private conversations between this woman and her husband which we spent so much time on yesterday. That's not what this case is about.

What this case is about is whether the Government actually eliminated all reasonable doubt about the question of whether Alexander Vasquez knew what was happening and knew about the drug deal and agreed to be a part of it before it occurred.

Now, when I started the case, I likened a criminal case to a puzzle, simply speaking, a puzzle in which each fact comprised a piece. When all the pieces are put together, it

the Government has proved its case beyond a reasonable doubt, you have one image, one image that shows absolutely clearly that the defendant knew and agreed.

Ladies and gentlemen, in this case when you put together the facts that the Government provided, those facts don't give you just one single picture, because this case is filled with uncertainty. It's filled with inconclusiveness, and it's filled with gaps and questions that cannot be answered and have not been answered. In this case, the evidence that is actually available shows that reasonable doubt remains, and the evidence that you have seen presented in this case indicates innocence instead of guilt.

So let's take a look, ladies and gentlemen, at what these pieces are, each one of them that the Government has tried to put together, and see if when they all come together they really eliminate reasonable doubt about whether he knew or whether he agreed.

Now, the first kind of evidence I'll talk about is the recordings that the Government presented.

THE COURT: Can we have a short sidebar, please?

(Discussion at sidebar on the record.)

THE COURT: You may be confusing the jury in terms of the burden. The burden is to prove guilt beyond a reasonable doubt, and I don't intend to give any instruction that would include the words "eliminate reasonable doubt."

MR. BRINDLEY: Okay.

THE COURT: You did it at least two times, maybe three, so don't do it again.

MR. BRINDLEY: Yes, Your Honor.

(Discussion at sidebar concluded.)

MR. BRINDLEY: Ladies and gentlemen, the recordings in this case, what do they show? Well, they certainly don't show us anything about Alexander Vasquez knowing about this drug deal. You heard recordings or you saw transcripts of recordings of conversations between the people who were in the drug deal, conversations between the Government informant, Alejandro Diaz, and Carlos Cruz, conversations between Carlos Cruz and Joel Perez. You've heard all about those. In all of those recordings, ladies and gentlemen, in all of the recordings, nobody ever mentioned Alexander Vasquez, no one.

You heard Carlos Cruz admit nobody else was exposed to be a part of this deal, and the recordings reflect that. The recordings reflect that this was supposed to be a deal with one buyer, and every recording shows only a discussion of one buyer, and that buyer was Joel Perez. The recordings say nothing and tell you nothing about what this man knew or didn't know, so the recordings don't prove anything beyond a reasonable doubt about knowledge.

The next kind of evidence that you heard was evidence of surveillance. Police officers had actually witnessed this

drug transaction that was supposed to take place in the Shell station parking lot. The surveillance, what do those surveillance officers see? They saw what the recordings said they were going to see. They saw Carlos Cruz, who they knew was involved, arrive with one buyer. He came with Joel Perez. Then they saw Carlos Cruz and his one buyer, Joel Perez, approach the informant and engage in the drug discussion.

Ladies and gentlemen, that's what they saw. Nobody saw Alexander Vasquez get out of his car and participate at all, no one. No one saw Alexander Vasquez do anything, because the fact of the matter is, ladies and gentlemen, as Agent Chupik told you, when he saw Carlos Cruz and Joel Perez come there, he didn't see the defendant, Alexander Vasquez, at all.

Well, part of the Government's theory was that Alexander Vasquez was following Joel Perez and Carlos Cruz to this deal. Ladies and gentlemen, if that were the case, if he really did that, someone would have seen him. Agents saw Carlos Cruz and Joel Perez arrive, but no one saw Alexander Vasquez following behind them.

More importantly than that, though, ladies and gentlemen, you have all of this discussion about where Alexander Vasquez was parked. Now, the fact is that he was not in the right parking lot to be a part of this drug deal. He was in the Denny's lot. There's been all kinds of discussion about that he was parked in a place where he obviously could

see what was going on so he would obviously know what was going on, and you heard multiple witnesses testify: Well, the bushes now are too overgrown. So then you could see, but now you can't.

In the picture, you can't see anything. The problem with that, ladies and gentlemen, is what Carlos Cruz himself told you about what he saw. You see, Carlos Cruz is a drug dealer, and he was getting involved in a drug transaction in the Shell station parking lot. He was meeting with Joel Perez and the informant.

When drug dealers are doing a deal, they're looking around. They want to make sure nobody is watching. Carlos Cruz believed, as he told you, the only people in the deal were Diaz and Perez. Carlos Cruz also told you that he never saw Alexander Vasquez.

Ladies and gentlemen, if Alexander Vasquez had really been parked right there, immediately next to where these guys were doing this drug deal, the drug dealer would have seen him. But he didn't. Regardless of what they say about the bushes, the fact remains that Carlos Cruz couldn't see Alexander Vasquez and, using common sense, Alexander Vasquez couldn't see Carlos Cruz.

So the surveillance tells us nothing about what he knew or what he agreed to. It tells us nothing. The Government keeps indicating as they talk about what happened,

they keep indicating that Mr. Vasquez was there to provide the money. That's the only reason he would go. That's why you have to have a trusted person. That's the only person Joel Perez would send.

But they're forgetting this one important thing that Carlos Cruz told you. This deal wasn't supposed to involve any money. Cruz told you what they were going there to do was look at the drugs to see if they were good, and then later they would buy them. There's no evidence to indicate when it was Joel Perez put the money in the hidden invisible compartment in the car, but the fact of the matter remains that this wasn't a deal that required a money man, as the Government indicated, because no money was supposed to be involved whatsoever.

So the claim that the surveillance showed because he was there that he was obviously involved is wrong. It doesn't prove anything. What the surveillance ultimately leaves you with is the one thing the Government does know, that he was present in the wrong parking lot, never getting out of his car, never talking to anybody. He was present. Well, if he's present, what does that mean? Does that mean he's necessarily guilty? Absolutely not, ladies and gentlemen, absolutely not.

When you consider the testimony of Marina Perez, what she did give, which I'll come back to later, it indicates that he had an absolutely different reason for going there whatsoever which no one ever disproved, not really, not

honestly, not at all.

You're going to get a jury instruction on presence and association. A defendant's association with conspirators is not by itself sufficient to prove his participation or membership in a drug conspiracy. If a defendant performed an act that advanced the criminal activity but had no knowledge that a crime was being committed or was about to be committed, those acts alone are not sufficient to establish guilt.

So if he performed acts that somehow advanced Joel Perez's drug deal without knowing that it was going to advance it, he's not guilty. So if the fact is that he was there in the car with a hidden compartment that could not be seen by anybody sitting in the car, that's not enough to prove that he knew or agreed. To prove beyond a reasonable doubt that he knew and agreed to show conspiracy, you can't prove it with this. It's not enough.

So what else did the Government provide you with? The Government turns to the phone records, and here is where they say you have to watch for the pattern because the pattern will show you that Alexander Vasquez obviously knew what was going on and that he obviously agreed to be a participant. Well, let's see, ladies and gentlemen. When we look at the phone records, do we really find a pattern?

What you have here is a copy, a demonstrative copy of the telephone chart that was presented to you by the

Government. On this chart, as you can see, there's certain entries that are shown. You will see that the white calls are calls between Vasquez and Perez. You'll see the green calls are calls between Diaz and Cruz and the yellow calls are calls between Cruz and Perez. Up at the top, this tells you who the caller is, who's making the call, in the next column here you have the timing of the call, and over here you have the identification of the person receiving the call (indicating).

Now, the Government's theory is that there's a pattern, so what these records should show if they've proven their case beyond a reasonable doubt, what these records should show is a stream of information, Diaz to Cruz, Cruz to Perez, and then Perez communicating that communication to Alexander Vasquez on the phone. That's what they suggest their chart will show you, but that's not really what the chart shows.

Take, for example, this first all-important entry on the 4th when Cruz contacts Perez and they have a conversation and a discussion about this drug deal. It's the Government's claim that Cruz gave information to Perez and that Perez turned around and gave that information to Vasquez, communicated it directly. So that's what the record should show, but it doesn't.

If you look at the record, what the record shows you is that after getting information through a call with Cruz, Perez didn't call Vasquez. Perez makes some call to his own

phone. I don't know if he's checking his messages or what he's doing. Then over an hour after speaking to Cruz, Vasquez calls Perez.

Ladies and gentlemen, if this was a communication of information from Cruz to Perez to Vasquez, at this point Vasquez has no information because according to these phone records he doesn't know anything about it yet. Yet the call comes from Vasquez to Perez. That doesn't fit with the pattern. Vasquez isn't giving any information to Perez because he hasn't gotten any yet.

So this record here when this happens, when you have a contact between Cruz and Perez, then all of a sudden instead of a contact from Perez to Vasquez to communicate the information, you have a call from Vasquez. It doesn't work. There's no indication that Vasquez is calling Perez about a drug deal because he wouldn't have information to give. The phone records don't show that. This does not support the Government's pattern.

That happens many times. You see it again here, Cruz speaking to Perez on August the 5th, and then Cruz doesn't communicate any information to Vasquez. Vasquez calls -- I'm sorry -- Perez doesn't communicate anything to Vasquez. Vasquez calls Perez. So there is no direct communication of information like the Government suggests. Again, it doesn't fit the pattern.

It happens here on the 5th again where Cruz contacts Perez and then Perez communicates nothing to Vasquez. You have a call from Vasquez to Perez instead when he doesn't have any information to communicate. We're supposed to be finding a pattern that shows this direct path of information, but there is no pattern, not here.

When you take a look at all of the entries, all of these supposed patterns of green and yellow and white that the Government is talking about, when you look at the calls that are supposed to show this conspiracy, based on the problem I just showed you, all of these are eliminated (indicating). All of them are eliminated as not supporting the pattern.

But then there's more problems. What the Government tells you here is this is supposed to be an example where Cruz calls Perez -- and this is on their sheet so this is what it looks like -- where Cruz calls Perez and there's information there (indicating). Then immediately after that, we have a call from Perez to Vasquez. That's what their chart suggests to you. That would be a direct communication of information. It would be if their chart was accurate, but it's not.

See, when you look at the real phone records and you look at the defense chart, which is a lot longer, what you find out is there was no immediate call to communicate the information. See all these calls, the ones that aren't listed on the Government's chart, all of those calls are made and

received by Joel Perez between the time he talks to Carlos Cruz and when he talks to Alexander Vasquez (indicating). There's no direct communication of anything.

What you see here is that Perez is involved in conversations with all kinds of other people after he talks to Cruz. By the time he talks to Vasquez, the phone records give no indication that he's still talking about anything that Cruz said because he makes all these other calls in between. The Government gives you a chart that's supposed to show a pattern that looks like there's a direct connection, but the truth is there's none.

Then it happens again here (indicating). It looks like we have a series of direct calls between the participants in the conspiracy, but we don't. Once again, Mr. Perez is involved in all these other conversations before he speaks to Vasquez. Again, there's no indication after he's had all these other calls that Mr. Cruz's information is being discussed at all. So the pattern again doesn't work.

We will see it again here where Cruz speaks to Perez, and then Perez is involved in other conversations (indicating). Then Vasquez is called by Perez at a time when there's no indication from these records that he's still talking about what Cruz said. The Government shows you one thing that looks like it's telling you there's a direct connection, but in reality the phone records and the facts betray that and show

that it is not.

The next issue here on these records is that the Government says: Well, we have all these calls, calls between Cruz and Perez, and then Vasquez is involved in all these calls around 5:00 o'clock, around the time of the deal. The only people who are participating in these calls are the people in this conspiracy, so it shows that he knew because he's right there in the thicket.

But, ladies and gentlemen, Joel Perez is not just calling Alexander Vasquez here. This is not just a situation where it's the drug partners, and the phone records show it. If you look at the phone records, Perez made 44 calls -- participated in 44 calls, I should say, with people from all of these different numbers that you see here during this same time period.

This was not just a time where Cruz is talking to drug partners. He may be involved in 44 other conversations, and there's no indication that he and Vasquez are talking about anything as to where Vasquez is supposed to go to find him and why he's not in the place he's supposed to be, none.

So the Government's phone records, again, they purport to tell you something, but the details that are left out, the facts, the pieces that they don't want to admit are part of the puzzle, they are there and they show that their claim of a pattern in these phone records is wrong.

What you end up with by the time of all these calls between Vasquez and Perez, what you end up with when they're taken out, the ones that don't fit the pattern, here's what you have, one time (indicating). Only one time was it actually the case where Cruz called Perez and Perez called Vasquez, one time. One time is not a pattern, ladies and gentlemen. One time is a coincidence.

In these particular calls, there is no way in the world the Government can tell you that Vasquez is actually talking to Perez about a drug deal at that time. The only way they're going to be able to show anything beyond a reasonable doubt with phone records is if those records show a definitive pattern like they described in closing argument.

MR. LEE: Objection, Your Honor.

THE COURT: All right. Sustained.

MR. BRINDLEY: But there is no pattern. The other thing we learn from the phone records that the Government might make note of is the fact that there's a lot of calls between Vasquez and Perez, 27 calls on August 5th, so they must have been involved in a drug deal.

If you look at the other records in this case, Agent Chupik told you these guys talked on the phone a lot. They were family. When you look at the other records in this case, these 27 calls don't mean much of anything. August 2nd, 47 calls. August 3rd, 41 calls. During neither one of those days

did the Government have any evidence to suggest there was any drug activity, none.

MR. LEE: Objection, misstates the evidence.

THE COURT: Overruled. Members of the jury, what the attorneys say in closing argument is argument. What the facts are is for you to determine.

MR. BRINDLEY: Ladies and gentlemen, the fact that there's 27 calls on this day doesn't prove that they were talking about drugs because they are having multiple calls. If you look at the phone records, you'll see the large numbers of short telephone calls between these family members happen all the time when there was no evidence of drug trafficking. So the numbers don't prove anything either.

The most important problem with the phone records, since they don't show you the pattern, we're left with the fact that the agent admitted we can't tell what was said during any of the calls between Vasquez and Perez. We don't know. So there's no way that these phone records can prove beyond a reasonable doubt that he knew or agreed or is guilty. These phone records leave us with almost no information at all. They talked about them a lot, but when we get down to the truth of what they are, they tell us very little.

So when that's gone, what is the next thing the Government has to rely on? They start talking about that he ran away from the police so that means he's guilty. Well,

ladies and gentlemen, the evidence shows you that's not right either.

You're going to get a specific jury instruction on flight, and that jury instruction is going to tell you that the fact that someone fled a scene immediately after a crime is not sufficient to prove guilt. You have a jury instruction that's also going to tell you that flight evidence must be viewed with great caution because it can be misleading.

The final part of that instruction is going to tell you that what you have to do when you're considering flight evidence is determine whether or not it gives you any actual insight into whether he committed the actual crime, whether he knew or agreed to this drug deal. So when we get down to what we know about this flight, it doesn't work.

To the question of why would he run away, well, here's what we know about him, what was admitted by the agent. Alexander Vasquez was on parole from his previous conviction. He was on parole. He had problems with the police before, and he had that concern, that fear that comes with it.

Ladies and gentlemen, while on parole when he's sitting in this parking lot, here's what he saw. According to the testimony, he saw six armed men, armed police officers, come running toward the vehicle, and one of them, for reasons he couldn't tell, slamming into the hood of his car. That's what he saw.

Someone on parole in that moment, they would be afraid. They are going to panic, and they're going to run away. It makes perfect sense. The reason Alexander Vasquez fled, has the Government shown you absolutely that that reason is because he knew about a drug deal?

MR. LEE: Objection.

THE COURT: All right. Members of the jury, what the attorneys say in closing argument is argument. It is their view of the evidence. What the facts are in the case is for you to determine, and you'll be instructed on this when I read the entirety of the instructions to you.

MR. LEE: May we have a brief sidebar?

THE COURT: Yes.

(Discussion at sidebar on the record.)

MR. LEE: Just to be clear in terms of the burden, the Government does not need to prove that the flight absolutely established his guilt. We have to prove guilt based on all the facts and all the circumstances, and our burden is beyond a reasonable doubt. It has to be clear that we're not singling out that we have to prove every single thing.

MR. BRINDLEY: I said that that was going to be prove his guilt, absolutely.

THE COURT: What your argument suggests is that the Government must prove incidental aspects of the evidence beyond a reasonable doubt when the burden is to prove beyond a

reasonable doubt each and every element of the crime, not the constituent components of the elements.

So the argument tends to take it down to some other aspect without saying the totality of the evidence proves the elements beyond a reasonable doubt. The Government doesn't have to prove beyond a reasonable doubt that he didn't go to Denny's to get breakfast, for example.

MR. BRINDLEY: Right.

THE COURT: So be careful in terms of using terms conveying to the jury what their burden is. The burden is beyond a reasonable doubt, and there will be no definition of what "reasonable doubt" is.

MR. BRINDLEY: Right, Your Honor.

THE COURT: So you must avoid any attempt to define it as you argue.

MR. BRINDLEY: Thank you, Your Honor.

MR. LEE: Thank you, Your Honor.

(Discussion off the record.)

MR. BRINDLEY: Ladies and gentlemen, has the Government been able to prove to you the reason he ran was not because he was on parole and afraid of the situation and that it was instead because he knew?

MR. LEE: Objection, Your Honor.

THE COURT: Members of the jury, you'll be instructed on the Government's burden in this case, and you will be given

that in written form. What the attorneys say at this point is mere argument. The argument must, however, be consistent with the instructions that will be given to you by the Court. You are to determine what the facts are, and to the extent that you do not accept the arguments of counsel, that is up to you.

You are the trier of the facts. The attorneys are telling you what they believe the evidence has shown or has not shown. Ultimately, you must determine what the facts are, and you will be instructed by the Court after you hear these closing arguments.

MR. BRINDLEY: Ladies and gentlemen, what the facts show here is that Mr. Vasquez had an absolutely legitimate reason to be afraid of the police and run away that had nothing to do with knowing about any drug deal, and nobody can disprove that.

MR. LEE: Objection, Your Honor.

THE COURT: All right. Sustained.

MR. BRINDLEY: Ladies and gentlemen, if the Government is going to present you with evidence about flight and make that an important constituent of their case, one thing they have to do is they have to give you evidence that is consistent, that works together, and that makes sense. On this issue of flight, ladies and gentlemen, they don't do that.

We heard from multiple witnesses talking about how this flight happened. The first was Agent Chupik, and what

Agent Chupik described was that the police officers were running towards the car. He said somebody slammed into the hood and fell down and head-butted the hood, the words that he used. Then after that happened, immediately after that happened, Mr. Vasquez put his car in reverse, spun it backwards toward two police cars parked behind that vehicle, and then managed to get it right in between those two cars, striking one of them as he came around and then striking another one as he moved forward. That's what Agent Chupik described.

He described sirens and lights during all of this, but Carlos Cruz was supposed to describe the same events, or he tried to, but he didn't see the same thing. Do you remember what Carlos Cruz said? He said that he saw Mr. Vasquez put the car in reverse, take it backwards and run into the cars with the rear of his vehicle, move it forward again, and then back into them again, which is completely different. That's what he said he saw.

The other police officer who testified about observing this collision testified to something different yet. You see, when I asked Agent Chupik, Agent Chupik admitted that he did not see Alexander Vasquez's vehicle move the Arlington Heights police cars. The reason for that is, of course, because of where they were. He was between two and six feet away from them. He couldn't get enough momentum backing up to move parked vehicles. It's impossible. So he said that didn't

happen.

But the other police officer who testified said that what he saw was he saw Alexander Vasquez going forward, pushing the Arlington Heights police cars out of the way, which is not what Agent Chupik saw and is not what Carlos Cruz saw. On top of that, Cruz said he didn't hear any sirens and didn't see any no lights, and he's in the same place at the same time.

Why is that, ladies and gentlemen? If this is consistent evidence that helps the Government to put together a case that proves the defendant guilty beyond a reasonable doubt, if it's consistent, then why can't they recount the event in the same way?

This isn't a situation where they're just making small mistakes, getting little facts wrong. They're talking about completely different collisions. One person is talking about someone pushing cars forward, and the other person is talking about someone performing a Mario Andretti-style turn that fits him right in between two vehicles. Then someone else is talking about a cartoon-style, back-and-forth, back-and-forth action.

That doesn't make sense. Why not? Two reasons. It could be because they didn't actually see it and didn't really know what happened, or it could be that they didn't want to admit what actually did happen and are trying to tell a story but can't get it right.

Ladies and gentlemen, the question that remains here that causes problems for the Government is this. If Chupik's account is accurate, why is Cruz's story different, and why is the other officer's story different? They can't prove a man guilty beyond a reasonable doubt by using evidence that doesn't make sense together. They can't put together one puzzle when their pieces don't fit. They can't, but they tried.

Then look at the damage that's revealed on these vehicles, the damage on the front driver's side here, the left side of one of the police vehicles (indicating). We see a significant amount of damage done to this car. Consider that much damage. We have that much damage to this car, damage to the front on the corner, the headlight, and damage to the front corner on the opposite side of this other vehicle there, the right side (indicating).

How does that fit with what they're saying Mr. Vasquez did? It doesn't, because he didn't have enough momentum going within that two to three feet as he backs up, or the two feet to move forward, to cause that much damage to two different vehicles, especially not with Mr. Vasquez's vehicle. When you look at this, the picture will be clearer when you look at the actual images themselves than they are here on the viewer, but there is no damage that's apparent to the rear of this car. You do see damage to the side but none to the rear of the vehicle, and there is no way he could have conducted

this backing up that they described without that.

Of course, the other question that's raised by all of this is why are there no law enforcement photos of this vehicle. I'll leave that to you. The bottom line is when we get to the end of what we know about this flight, it appears that the photographic evidence doesn't match the testimonial evidence. What it looks like is we have damage to the front left side of one car and the front right of the other car, which is consistent with two cars striking Mr. Vasquez's vehicle at the same time. That's what it's consistent with, the photos.

If that happened, ladies and gentlemen, we know these were unmarked cars. If that's what happened, then the fact that he ran away is no mystery. Who wouldn't run away when the police come running in and hit you from both sides at the same time. That doesn't prove that he knew about a drug deal. It proves that he was panicked when two people ran into him, and the evidence supports that more than it supports their account.

Also, when you look at the other facts, it makes sense because what we know from the surveillance officers, what they saw was they saw what was supposed to be Carlos Cruz and Joel Perez following the informant to this other site where they were going to get the cocaine. But that didn't happen. The informant left, and nobody followed him. Cruz starts to follow him, and then he gets back out and goes back over to

where Vasquez is parked in another parking lot. They don't know what's going on. They don't know what Mr. Vasquez is doing. It looks like what happened is Joel Perez, for whatever reason, didn't want this deal, didn't like the terms and walked away. Then Cruz started to leave and went back to try to convince him otherwise.

Either way, what it looks like to the officers is the deal is not going through. Then when it doesn't go through, Perez goes over and gets in the car with Vasquez. Then they start to leave because Vasquez has nothing to do with this. That would explain why two cars would hit him, because then the police have to stop them. They don't know what's going on, so they hit them from both sides. That would explain the photograph, and that would explain why they don't want to admit what really happened and end up telling contradictory stories. So the flight doesn't prove knowledge at all.

What else do we have? Well, in the Government's picture, we also have a bunch of extra things that also don't quite make sense. You see, there are these phones, and we know that Joel Perez is in this deal. We know that because Carlos Cruz and he are talking on the phone. He appears at the deal. He participates in the deal. He is in this. He's the one customer. When he gets -- when law enforcement comes after him, he runs and what else? He throws his phones away. Then when they get his phones, they find that they're under

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fictitious names. They're not his.

Mr. Vasquez, on the other hand, when he's arrested, he's got his phone in his pocket. He makes no attempt to throw it away. He has plenty of time because he's trying to get away and knows what's going on.

Ladies and gentlemen, to go back to the flight for a moment, by the time he had this collision and started to run away once he knew it was the police and he was on parole, the fact that he continued to try to avoid contact with them makes perfect sense. Remember, he's not charged with resisting arrest. That would be a different case. In this case, what he did there proves nothing about knowledge.

More than that, ladies and gentlemen, the description of what Mr. Vasquez did here when they're saying he's running away, it also seems to be a bit of a stretch. The officer claimed that what happened was Mr. Vasquez was running so fast the police car came to a stop and Mr. Vasquez ran right into it. He had to brace himself. That's what the police officer said. He was a very, very young police officer.

The problem with that is at first the officer said: Well, I pulled the car up, and I was able to stop the car.

So he had time to stop his car and get into position, and Vasquez didn't have enough time to stop running? But that's not really the problem. The problem is this. What the officer said was: Well, then it looked like there was going to

be a foot chase. I had been driving around with my car door open, Dirty Harry-style, I guess, to try to track this guy down, but I got out of my car because it looked like he was going to run away.

Then finally when we got down to questioning this police officer, what he said was: Okay. There was no foot chase. I got out of the marked police vehicle, and he got arrested.

That's what we know. The fact of the phones which were thrown away doesn't support the theory that Alexander Vasquez knew or agreed to participate in the drug deal on this day.

On the car, we've heard multiple witnesses, a whole host of them, so the Government has no contradiction that this car belonged to Joel Perez. But the Government says: Oh, well, Mr. Dunleavy told you that Mr. Vasquez went and bought the car with Mr. Perez.

Not really. He said that the man who Agent Chupik said he identified as Perez was the one who gave him the money to buy the car, and the man who filled out the paperwork, that was also Perez, for the car. Apparently it's the Government's theory that if you go with someone who's buying a car, you become an automatic owner.

That's not true, either. Perez paid for the car. Perez bought the car. Perez filled out the paperwork for the

car and put it in his wife's name. The Government also goes on to say: Well, wait a minute. The title was changed from the wife's name to Alexander Vasquez's daughter's name, so that means Vasquez did it.

You can't just assume that. Where's the proof? The proof is not there. If you look carefully at the title with Mayra Vasquez's name on it, you will remember what Agent Chupik admitted to me. There's a phone number that's supposed to be Mayra Vasquez's number. But whose number was it? Joel Perez's number, the same number he used to call Carlos Cruz.

He bought the car, and when he wanted to switch it out of his wife's name maybe to make it look like it was not involved with someone who's dealing in narcotics at that time, he put it in the name of Alexander Vasquez's daughter. We know it was Perez because his phone number is on there.

So when they try to turn it around and say that it wasn't, that it was Vasquez, there needs to be some proof. There is no proof. This claim about the car title, it proves nothing that he knew or agreed to anything. In fact, the car, everything we know about it suggests it was Perez and not Vasquez.

Then, of course, there's this trap compartment. Well, he was driving a car with a trap compartment in it so he must have known. It's a trap compartment. It's hidden. You can't see it. That's what everybody said. The Government

agent said they couldn't even figure out how to get it open. They had to rip the whole thing apart.

So just being in the car, none of us would be able to see it. So how is it that he necessarily knows about it? When they opened it up, they said there were no fingerprints identifying that he was able to open it, none identifying that he had ever been in it. The trap compartment, there's no proof that he knew that it was in that car, none.

To try to get around that, the Government goes back seven years to something that happened in 2002. But what he knew seven years ago doesn't tell us anything about what he knew about that car on that day, and that's all that counts. The fact that we start going back seven years says a lot about the strength of their case.

Ultimately none of that, the phone records, the recordings, the surveillance, none of it, the flight, none of it, if you add all that together, none of that proves beyond a reasonable doubt that Alexander Vasquez knew or agreed or was guilty of any of these crimes.

The only place they really get knowledge, the truth is the only place they get any claim of knowledge is from Carlos Cruz. That's it. Carlos Cruz said that when he went over to the Bonneville, Vasquez told him that he knew about this. Let's think about that. That's the only evidence of knowledge, and that's the only time Carlos Cruz could have ever

said anything that indicates that Alexander Vasquez knew because that's the only time he ever saw him.

It's extraordinarily lucky for Carlos Cruz that the events happened in the way that he described. He says: I went over to the black car, and then Perez looked at me and said "we have the money." Then immediately after that, Vasquez said "we have the money."

Why would anybody do that? Does that make sense at all? One guy says it and the other guy parrots it for no apparent reason? Does that sound like something that really happened or something that Cruz thought he needed to say so that he could give Vasquez knowledge and have something to testify about to get the benefit under the cooperation deal?

Here's what we know about Carlos Cruz. How believable is he? Carlos Cruz lied about Mr. Vasquez. He lied about him immediately after he was arrested. He lied to incriminate him, and you heard what he said. He said: I met Vasquez before I went to Arlington Heights to do the drug deal.

That's what he told the police. That's what he said, ladies and gentlemen, but he didn't. He admitted to you he actually didn't. Then I confronted him about it: When you said that you were lying.

Well, I was going to get arrested.

So you can lie whenever you get arrested?

No, not really.

But then he said that he falsely incriminated him with the agent to tell the agent what Mr. Cruz thought he wanted to hear. He was telling him what he wanted to hear. This man is somebody who's willing to lie, to tell an agent what he wants to hear to try to help himself. Then he gets on this stand with a cooperation agreement that will give him a benefit, and he tells them what he thinks they want to hear.

Is Carlos Cruz credible under those circumstances? Absolutely not, he's a liar. He couldn't even tell the truth consistently when he was on the stand. That was his problem. He wasn't even close to being able to tell the truth consistently. Carlos Cruz first said when I questioned him: Yeah, I lied about Alexander Vasquez. I said I met him before, and I really didn't.

Then the Government tried to rehabilitate him and asked: Well, when you got arrested, did you really say that?

Then he said: Yes.

Then a minute later, he went on to say: Well, actually I never said anything about him.

Well, if you told them that you met him before you went to Arlington Heights, then you didn't say nothing about him. But he kept saying both. He couldn't tell the truth from a lie right here in front of you, and he's the only person that proves anything about the knowledge that Alexander Vasquez actually had.

He didn't just lie about that. He swore under oath in an affidavit that he was not given his Miranda warnings about his right to an attorney. That was before he had a cooperation agreement with the Government, back at a time when he was trying to get his statement suppressed to help his case. So he said that, and then he lost that motion. His statement didn't get suppressed.

Then he pled guilty and wanted to become a cooperating witness for the Government because he thought that would help him. When he needed to be a friend to the Government, all of a sudden he said: Well, maybe I did hear my Miranda warnings. I was looking around a lot, and I might have missed it.

Ladies and gentlemen, that is ridiculous. Carlos Cruz says whatever he thinks will help him at any given time. When he needs to say he didn't get Mirandas, if that will help him, he'll say it. When he thinks he needs to say they want to hear Alexander Vasquez was met by him before he went to Arlington Heights, he'll say it. When he thinks he needs to say that actually he might have been read his Miranda rights, he'll say that, too. We know that because he said all of those things. This person is absolutely not honest, absolutely not credible.

Here's the other problem, probably the biggest one. The only thing he said that actually indicates Vasquez having

real knowledge is that he spoke to Mr. Vasquez by this black car and that Vasquez said this thing about knowing about the money. That's the only thing.

Ladies and gentlemen, when he gets arrested on August 5th, he didn't mention that to anybody. Then before he signed his guilty plea, he said he had a multiple-hour conversation with the agents telling them all about the crime, talking about how Perez said certain things and Diaz said certain things, and he forgot to mention that Vasquez said anything.

Think about it. When did he remember? August 19th, approximately one week before he was going to have to be a witness for the Government in order to get his cooperation deal here. Ladies and gentlemen, confronted with that fact, he just came up with it all of a sudden. How could you have forgotten it for so long? What did Carlos Cruz say?

I didn't. I told them long before.

Then I said: Are you certain?

He said: Yes.

But then Agent Chupik said: No, it was August 19th. That's the first time he told us.

Ladies and gentlemen, Carlos Cruz, that's who we end up with, Carlos Cruz. The other thing, ladies and gentlemen, if Carlos Cruz is telling the truth, there ought to be something to corroborate it. Take a look at the Government's [illegible] list, and you'll see what that something might be.

Call 65, which is a call from Perez to Cruz, this is supposed to be the -- I'm sorry. Yes, it's 65, and then there's a call from the CS to Cruz, so two of these calls. These are the calls, 65 and 66, where the information that is being conveyed is supposed to be that they want the informant to bring the kilo back and they're going to wait there in the parking lot. Well, we know the informant was wearing a body wire. He's recording this stuff. We didn't get any of those calls to support Carlos because Carlos Cruz cannot be supported by any corroborating evidence.

Ladies and gentlemen, when your only claim of knowledge has be to be built on the testimony of someone who admits that he lies to tell them what they want to hear, someone who forgot the quintessential piece of evidence until just one week before he has to give testimony, where they took him from getting a minimum of ten years to what he hopes is 45 months, less than five, ladies and gentlemen, in a case like this where that's the only claim of knowledge, the defendant cannot be proved guilty beyond a reasonable doubt.

It can't happen because that's all they have. Their case ultimately comes down to Carlos Cruz and if he's really that convincing that you can believe beyond a reasonable doubt that Alexander Vasquez knew and agreed. In light of what we know about Carlos Cruz, he isn't, he can't be, and he never will be.

After all of that, that's all the evidence they really have about August the 5th, and none of that proves beyond a reasonable doubt that Alexander Vasquez knew and was guilty, none of it. Then what do they do? They say they'll go seven years back. He got convicted in 2002. Ladies and gentlemen, nothing that happened seven years ago is going to prove what he knew on August 5th. That's absurd.

What do we know about what he did when he was actually doing a drug deal in 2002? We know he actually made calls and set up the deal. We know he actually did the meet, handed over the drugs and got the money. We know that. That's how he was. When he got caught, he pled guilty. We know that. That's what he did when he was dealing drugs. He didn't do any of that in this case. The things we know about how he acted when he was dealing drugs in '02 are totally different than what happened in this case, so it tells us nothing.

The fact that we get bogged down by a distraction leading us seven years back suggests that the Government doesn't have enough evidence to prove their case beyond a reasonable doubt and they resort to this.

MR. LEE: Objection.

THE COURT: Members of the jury, what you are hearing is the argument of counsel. You must resolve the facts in the case. You'll be instructed on these points later.

MR. BRINDLEY: So, ladies and gentlemen, this thing

that happened seven years ago is irrelevant to the real question, the fundamental question, what he knew and what he agreed to on August the 5th, 2008. The only way something that happened seven years ago would help is if it was the case where if he had a previous conviction, you'd say once a drug dealer always a drug dealer, and the burden of proof doesn't apply to him anymore. But it does. It still does.

You're going to hear the evidence -- the law. The law is going to tell you when you're instructed by the Judge that he has an absolute presumption of innocence. The fact that he got convicted in 2002, he did his time for that, and it has nothing to do with this. He doesn't lose the presumption of innocence because he made a mistake in the past. He doesn't. They need to prove beyond a reasonable doubt that he knew and agreed on August 5th, not in 2002.

Then we come to this. By the time the Government's case is over, Carlos Cruz is completely discredited. The evidence is not showing beyond a reasonable doubt that Alexander knew or agreed to anything. We heard testimony from another witness, and that was Ms. Marina Perez, and then we heard all kinds of other things about her after that. The case sort of got off on a sidetrack. It was all about her, what she knew and what she didn't know.

But the point is, ladies and gentlemen, the Government is the one with the burden. They have to prove

their case beyond a reasonable doubt, and they didn't. Their case was over and lost when Carlos Cruz was discredited.

When the defense called Ms. Marina Perez, what did she tell you? Well, what she told you was that Alexander Vasquez went out to his car to try to go get Joel Perez because she asked him to. She had a fight with Joel Perez, and she asked Alex to go get him. He went out to get in his car. He couldn't get in it because hers was blocking his. So he went back inside and she gave him the keys to go, indicating that he didn't know anything about money in the car and is not guilty of being a part of this scheme or of agreeing.

The Government wants to say that she was never supposed to go get him because he was doing a drug deal. You'd never have someone like her, who is clueless, go out there to pick you up. Well, he wasn't doing a drug deal. He was going to look at some cocaine. That's what Carlos Cruz told us. There was no money that was going to transact. He was going to look at some cocaine, and then he was going to go home. She was going to pick him up.

Does the Government claim that that proves anything? It doesn't. The truth is there wasn't supposed to be any money in this deal. The fact that Joel Perez had hidden money in his car at some unknown time and that it was still sitting there doesn't mean anything. The fact that he might have been going to use that money to buy the drugs later after he looked at

them, that doesn't tell you anything about whether she's telling the truth or not.

Think about what her testimony was like. It shows that he didn't go to the Denny's to bring any money there. He didn't know about the money. It shows he didn't know about any trap compartment. It shows that there's no evidence of agreement or knowledge, none.

What do we know about her? Well, you saw her. Her testimony was credible. Use your common sense. You'll be able to judge her credibility, and you saw her give her testimony. It was hard for her. It was tearful. It was sincere because she was saying things that hurt her husband and told the truth about Mr. Vasquez. It was hard, and she was absolutely credible.

More than that, it was consistent. It didn't change. There was nothing in her testimony that was contradicted, nothing whatsoever. It was consistent, and it made sense with all the facts. If her story is true, that explains why Alexander Vasquez wasn't mentioned on the recordings. It explains why he wasn't seen in the surveillance. It explains why the phone records don't show what they're supposed to show. It explains everything.

If you look at the phone records, she says they got there around 3:30, to Alexander Vasquez's house. If you look at the phone records, that's when the calls between Vasquez and

Perez stop, around 3:30. She says that Joel Perez left then after arguing with her, shortly thereafter, and they were there to help with Alexander Vasquez's mother who was in a nursing home and had a stroke, that they needed to move her and change her. Did anybody prove that any of that wasn't true? No.

MR. LEE: Objection.

THE COURT: All right. Members of the jury, you are to determine what the facts are. The closing argument of the attorney is argument. It's the attorney's view of the evidence. What actually happened is for you to determine.

MR. BRINDLEY: The facts weren't contradicted at all. Her testimony makes perfect sense. She said Joel Perez left her sometime around 4:00 o'clock. She was really mad and said: I'm not going to get him.

She asked Alex to go, and sometime shortly after 4:00 o'clock on the phone records you'll see that Alex called Joel to try to figure out where he's going to go and when he's supposed to be there. It all fits together.

Really, when we get down to a credibility debate, Mrs. Perez versus Carlos Cruz, those are the two witnesses you're comparing. How do we even compare the two? She is a person who didn't want to come here voluntarily, who was subpoenaed, who gave testimony that was hard, and whose testimony was never contradicted. The facts were never contradicted. Carlos Cruz is a person that came in here and

got caught lying multiple times during his testimony. If this is a credibility question between the two of them, there's no doubt that she is more credible. That means the Government hasn't proven their case beyond a reasonable doubt because her testimony shows that he's not guilty.

Now, after she gave that testimony, what we saw as essentially the response of the Government was just sort of a desperation mode. This case was over. It was not proven beyond a reasonable doubt, and there was no way it was going to change. So what did we get then? We got this litany of -- they brought her back in here, and we got this litany of these recorded calls that show the following things.

Number one, Marina Perez hates me. She hates me, and maybe she has good reason. I used her next door neighbor and her friend to trick her into getting a subpoena she didn't want. I did that because it was my job, and she hated me for it. She hates me because I was unwilling, as she told you and admitted herself, to come to trial and put on some sort of a defense that would help her husband and my client because that's not what the evidence showed.

I didn't represent her husband, and she hated that. Then she said all of those things about me, which was definitely a first for me in a trial, the size of my office, all off those things, suggesting that she can't stand me and that she loves her husband absolutely. Those calls show that

definitely. These are private conversations between herself and her husband. They're dragged here into court as a sideshow.

Look at her. The idea that she would somehow be willing to say things that would hurt her husband to please me in light of what she said about me, that idea is absurd. It is ridiculous, and those tapes don't prove it at all. This was a credible person who came in and gave testimony she didn't want to give because she had a duty to do it because of a subpoena, and nobody proved differently. She's not lying. When they brought her back in, she answered all the questions. They asked her questions in a stern tone: Well, you said this on the calls.

Then she said: Yeah.

Then when I questioned her, she explained what it was, and it perfectly fit with what you saw. You have these calls where she was talking to her husband about how I said various things about the status of his case, and I did. I wanted her to testify and was telling her that she was going to get a subpoena because I knew she had information.

MR. LEE: Objection.

THE COURT: Sustained. Disregard the personalisms by counsel.

MR. BRINDLEY: The evidence from her, she testified, ladies and gentlemen, that it was her understanding that what

these calls meant was that she was angry. She was angry because Mr. Vasquez's lawyer was unwilling, unwilling to put on the defense that her husband wanted. That makes perfect sense with what the calls say, perfect sense.

The real problem with what the Government did is they put her on and asked her these questions, and then they didn't play the tapes. They waited till she was gone, and then they played them so that she'd never be able to even respond to them. So then they could come up here and say: Well, this is what it means.

Well, they don't know what it means. They weren't part of that conversation. It's a guess. It's speculation. It's them trying to find any way they can to say that she is not telling the truth because they can't contradict the facts. So they resort to this.

They have insinuated that somehow I was able to tell her what to say, that Mr. Vasquez's lawyer was able to tell her what to say. Ladies and gentlemen, those tapes don't indicate that at all. There's not one time on any of them when she says: He told me to say it.

It didn't happen. She admitted to you that it never happened, not one time, not one indication. That's something they say. That's something they made up, but it's not actually there. There's nothing that proves that Mr. Vasquez's attorney told her to do anything but tell the truth, nothing.

MR. LEE: Objection.

THE COURT: Can we have a sidebar, please?

(Discussion at sidebar on the record.)

THE COURT: What's the objection?

MR. LEE: It just seems like we're getting into a different issue in terms of the defense attorney's liability in all this and not necessarily -- or getting away from the credibility of witnesses and Mr. Vasquez's liability.

THE COURT: What's your response?

MR. BRINDLEY: My response is that the Government has attacked a witness who testified on behalf of Mr. Vasquez and said she's not credible. This argument demonstrates that she is credible, and there's nothing to contradict it.

THE COURT: That's your argument?

MR. BRINDLEY: Yes.

THE COURT: The one thing that you cannot argue is a false dilemma, to give the impression to the jury that they must decide the case on a false dilemma, which is to say that this witness or that witness controls, because it ignores the burden which is looking at the entirety of the evidence.

MR. BRINDLEY: Right.

THE COURT: The totality of the evidence.

MR. BRINDLEY: Yes, Your Honor.

THE COURT: There was no objection to that. That was a false dilemma argument, but that objection was not made.

MR. BRINDLEY: Yes, Your Honor.

THE COURT: I was waiting for it, and it didn't come.

MR. BRINDLEY: Okay. Thank you.

THE COURT: Certainly you should not say "thank you" when the Court makes a ruling.

MR. BRINDLEY: Sorry.

THE COURT: So what do you intend to say at this point?

MR. BRINDLEY: I'm just going to talk about the specific instances that they talked about on the tape.

THE COURT: I have said that you must avoid personalisms.

MR. BRINDLEY: I will do that.

THE COURT: All right. Proceed.

(Discussion at sidebar concluded.)

MR. BRINDLEY: The Government may pull specific statements out of the telephone calls and try to indicate that that means she's not telling the truth. They sort of insinuated that when they talked about her saying to her husband that both of them are in big trouble. But what she really said when you listen to the call was: Look, if you're guilty just because you're there, then he's guilty because he was there, too.

Well, if being there made you guilty, that's right, Alexander Vasquez was guilty. The problem was that she didn't

want to admit or her husband didn't tell you what you know. He wasn't just there. Mr. Perez was there, and he was on the recordings. He was participating in the deal, and he met the cooperating source with the money in his car, his car. Ladies and gentlemen, that doesn't show that she's dishonest. That just shows what happened during a conversation with her husband.

The Government may talk about certain moments where she talked about strategy and suggest that there was some strategy that Mr. Vasquez wanted to use, some strategy that would get her to lie somehow, but the tape doesn't say anything like that. There was a discussion about strategy between the lawyers to try to help both defendants and unwillingness to do that, but none of that indicates that she was not telling the truth.

Then there was this discussion of these other tapes where what she told you was there was conversation that she had with her husband about whether certain arguments that had been used in the past could be shared with counsel for her husband when it came time for him to be sentenced. There's an idea that somehow that indicates that she would lie here in court.

Well, there's no indication of that. There's nothing on those tapes to suggest that these arguments are going to be provided in exchange for anything. Of course not. Of course not. Arguments being shared between lawyers, colleagues in the

same case, of course, that can happen, ladies and gentlemen. It can, and there's nothing to indicate that it was going to be exchanged for anything. That's something that they made up. That's something that they said. That's not something that the tapes say. That's not something that the evidence says.

The idea that that's the incentive and that she was going to lie over that is absurd, talking about incentive. There's obviously no incentive. It wasn't enough of an incentive because she wouldn't come testify on her own. She had to be tricked by the next door neighbor, subpoenaed, no incentive.

But if you want to talk about incentive, ladies and gentlemen, the idea here is that Mr. Vasquez or counsel for Mr. Vasquez somehow was going to get her to lie by giving some documents or some arguments to another lawyer to use in his case, which no one has said is inappropriate, versus the Government's ability to offer Carlos Cruz a reduced sentence from a minimum 10 years to 45 months. If you want to talk about incentive, come on.

Ladies and gentlemen, this whole thing about all these recordings with Mrs. Perez is something that was made up in response to testimony that couldn't be contradicted on the facts, and that's all that it was. It proved nothing, and it was meant to distract you from the lack of facts that were proved during the Government's case and the fact that Carlos

Cruz cannot possibly compare in honesty and credibility to Ms. Marina Perez.

MR. LEE: Objection.

THE COURT: Let's have a sidebar, please.

(Discussion at sidebar on the record.)

THE COURT: When you're arguing that they made it up, who is the "they," the prosecutors? They made up evidence?

MR. BRINDLEY: I'm not arguing that they made up evidence, but they are --

THE COURT: Who is the "they"?

MR. BRINDLEY: "They" would be the Government writing an argument.

THE COURT: Are you saying that the Government made up evidence?

MR. BRINDLEY: I'm not saying that they made up evidence.

THE COURT: That's what it sounds like.

MR. BRINDLEY: I'm saying they made an argument that was misleading.

THE COURT: Then rephrase your comments.

MR. BRINDLEY: Yes, Your Honor, I'll do that.

(Discussion at sidebar concluded.)

MR. BRINDLEY: Ladies and gentlemen, ultimately when we come to the end of the case, there's nothing, nothing that the --

THE COURT: All right. Members of the jury, we just had a sidebar on an issue. Counsel referred to "they," that an undefined "they" made up evidence. Disregard those comments.

Proceed.

MR. BRINDLEY: Ladies and gentlemen, the evidence was what it was; and you get to judge it. My argument, my point is that it doesn't indicate that she's not lying, and any suggestion that it does is an incorrect argument. It doesn't fit with the facts as you actually see them, because it's not really there in what you have.

Now, ladies and gentlemen, in a minute the Government gets to come back up here, and they get the last word. I don't get to speak for Mr. Vasquez again. When they do, there's certain arguments that the Government might make. They might say that it's just a coincidence, just a coincidence that Alexander Vasquez was in the right place -- and you already heard it -- at the right time in the right car, that it's a coincidence.

It's not a coincidence. You heard testimony from a witness who told you exactly how it happened. It's not a coincidence. He went there to pick him up because she asked him to. He tried to get in his car and couldn't, and he didn't know anything about the money. It's not a coincidence. It's a matter of fact. There's no coincidence to be had here.

The Government might come up here and say: Oh, well,

Mr. Vasquez, he must be the unluckiest man in the world, so unlucky that he could be put into this situation, so unlucky that this could all happen to him -- suggesting that it's not true.

Well, ladies and gentlemen, it's not a matter of luck. Alexander Vasquez presented a credible witness while the Government presented one who lied in front of you.

MR. LEE: Objection, Your Honor.

THE COURT: All right. Members of the jury, you will be instructed on these issues shortly. What the attorneys say in a closing argument is their argument, and it is their view of the evidence. However, an attorney should not speculate in terms of what somebody might possibly argue in a closing argument.

MR. BRINDLEY: Alexander Vasquez presented a witness who was credible and not disproven. The Government presented one who lied right in front of you and got caught and kept on lying. That's not a matter of luck. It's a matter of fact. He's not on the recordings. He wasn't seen in the surveillance. He wasn't parked in the right lot. That's not a matter of luck. It's a matter of fact. The facts show that the Government has not proven beyond a reasonable doubt that he's guilty. The fact is he didn't do it, whether he's lucky or unlucky.

So in the end what we come to is a situation where

you had two pictures of what this case was about. The Government gave one picture at the beginning of the case, which is a picture of Alexander Vasquez following Joel Perez and Carlos Cruz. He was riding in his car with his money going to participate in the drug deal.

That one was absolutely not confirmed by the facts because you found out it wasn't his car. You found out nobody saw him following, not Cruz, not the agents, not anybody. You found out from a witness for the defense that he didn't even go out there at the same time that Perez did.

So their picture, the one that they promised you in opening statement was going to be demonstrated by the facts, it wasn't. They didn't prove their case beyond a reasonable doubt. Instead, the picture presented by the defense fits with everything. The testimony given by Marina Perez, it fits with all of the evidence, all of it. There's nothing changing.

The Government has argued that somehow they can challenge her bias, her credibility. Well, they can do that all day long if they want to, ladies and gentlemen, but here's the issue. The facts that she testified to about how it happened, how they went to Alex's house, how Joel was picked up by somebody, how she asked Alex to leave and get Joel, those are the facts. No matter what they say about her bias, they don't have any facts to prove that they're wrong. That means they didn't prove their case beyond a reasonable doubt.

What we're left with in the end is an attempt by the Government to guess, to ask you to guess: Well, let's guess. Let's guess. Maybe after they left, when he called them up on the phone, maybe then they talked about the drugs.

They can't prove it, so it's a guess. They could say: Well, let's guess. Maybe when Mrs. Perez, when she argued with her husband, maybe it was actually about drugs. Maybe Mr. Vasquez heard it.

That's a guess. They can't prove it. Maybe, maybe Alexander Vasquez ran away because he knew about the drug deal. Maybe. It's a guess, and they can't prove it.

They can show you the transcript they admitted during their rebuttal case where Carlos Cruz says that he's going to pick up his cousin who's supposed to be Joel Perez. Like around 4:00 o'clock, he says that. Then at 4:46, he's still driving to get him. Then they say: Well, look, Cruz didn't pick him up at his house at 4:00 o'clock. He was still going to get him at 4:46. So that shows that actually it was Cruz who picked him up.

You have to guess because there is no proof. Ladies and gentlemen, this isn't a place where guessing is permitted. The Government has to prove their case beyond a reasonable doubt. They can't do it with assumptions. They have to fill the gaps in the evidence with actual facts. What they gave you was this information about flight, and they want you to assume

it means that he knew. But they can't fill it with evidence, and the gap remains. An assumption won't do. They have to prove it.

They talk about what he did seven years ago, and they want you to assume that means he knew this time because of something that happened before. But they can't assume it. They have to prove it, and they didn't. Ladies and gentlemen, that's the reality.

They talk about these telephone calls that Mrs. Perez had with her husband. They want you to assume that she lied because of them. Because you have to assume it, they haven't proven it. They didn't. It's a guess. It's speculation. It's maybe.

Ladies and gentlemen, here's what the reality is. The burden of proof in this case is not a guess. It's not probably. It's not maybe. It's not could have. Did they prove beyond a reasonable doubt that he knew and agreed? All of the problems I've shown you, all of the missing pieces, the testimony of Mrs. Perez that they cannot contradict and have not contradicted despite their best efforts other than guessing, all show that reasonable doubt remains.

Now, ladies and gentlemen, one thing is true, and you'll be instructed on this as well. Alexander Vasquez has an absolute right not to testify in this case. He has that right, and no one can hold it against him. After what has happened to

him in this case, he has every right to sit there and let the Government's case fall apart, which it did. It did with Carlos Cruz. It did with that evidence of flight that contradicted itself. It fell apart, and nobody can hold that against him in this case.

He is presumed innocent until they prove him guilty beyond a reasonable doubt, and that proof can't come in the form of distractions about flight or what happened seven years ago or about somebody's personal conversations with her husband.

MR. LEE: Objection.

THE COURT: All right. Members of the jury, what the attorneys say in closing argument is argument. You are to determine what the facts are. To the extent that your recollection of the facts is different from what the attorneys argue, you must rely on your recollections, your collective recollections of what happened when you go in to deliberate. You'll be further instructed on these issues after closing arguments.

MR. BRINDLEY: Ladies and gentlemen, at the beginning of this case, it started out as a very simple drug case. The question would be whether he knew and whether he agreed, and it looked that way for a while. Then eventually it sort of turned into a circus that was confusing and unexpected.

When we get down to what the evidence is and what the

evidence showed and what it didn't show, the case goes back to being simple again. The Government did not prove that he knew or agreed beyond a reasonable doubt. I've gone through all of the evidence they presented, and none of it is enough.

Ladies and gentlemen, the question you have to answer now when you go back to that jury room, you have to give a very honest consideration of that question: Did they prove it beyond a reasonable doubt? Not that he might have or he could have, did he really know and really agree? Did they really prove it beyond a reasonable doubt?

If you consider that question honestly, ladies and gentlemen, then you will know the answer. You saw in this case what it would look like when you had convincing evidence showing guilt. You saw evidence of Joel Perez and Carlos Cruz, evidence where they were on the recordings, evidence where they participated in the deal, evidence where they were not just merely present but actually doing things, evidence that wasn't contradicted, evidence that was real.

Compare that to what they gave you about Alexander Vasquez, and you will see that the Government didn't even come close to proving this case beyond a reasonable doubt because the evidence that would be there if he was guilty isn't, the surveillance, the recordings. We wouldn't be guessing about why he would run away or what his wife meant -- what Mr. Perez's wife meant on some tapes or what happened seven

years ago. If we had convincing evidence beyond a reasonable doubt, it wouldn't be necessary. The fact that it happened demonstrates the weakness of the case that's being brought in this courtroom.

Ladies and gentlemen, it certainly is true that Alexander Vasquez made mistakes in the past, and we've heard about that conviction. He has a conviction when he got involved there, but those aren't the mistakes that he's charged with in this case.

The fact that a man made a mistake in the past and can still receive a fair trial in the present, that's something you guys will decide when you make your decision. When you make that decision, all I'm going to ask you is to reasonably and carefully consider the question: Did they really prove beyond a reasonable doubt that he knew and agreed in this case? Did they really give you any facts to disprove what Mrs. Perez said the facts were? Did they really give you any reason why you should believe Carlos Cruz in light of what you know about him?

Ladies and gentlemen, when you answer that question, that answer will be no. The picture that the Government presented in the end is a picture that doesn't tell us much. It has gaps. It's incomplete. When you put all of that together, what it shows you in completion is that Alexander Vasquez is not and has never been guilty of this crime. It is

your duty to say so. Thank you for your time.

THE COURT: It's roughly about 20 minutes till 3:00. The Government may make its closing argument.

MR. LEE: Yes, Your Honor. May I have a moment to adjust the computer?

THE COURT: Proceed.

(Brief pause.)

FINAL ARGUMENT ON BEHALF OF THE GOVERNMENT

MR. LEE: Alexander Vasquez, the defendant in this case, does sound like the unluckiest guy in the world when listening to defense counsel. All he wanted to do apparently on August 5th, 2008, was to go pick up his cousin in Arlington Heights, and look at everything that happened to him.

First, it turned out that his cousin was in the business of dealing drugs. Two, it turned out that he happened to have multiple telephone calls with his cousin just as the cousin was arranging a drug deal. He talked to his cousin at 11:51 a.m., Call 25 on the Government's chart, just five minutes before his cousin confirmed with Carlos Cruz that the drug deal that afternoon was on.

Then he talked to his cousin at 5:05 p.m., Call 58 on the Government's chart, almost exactly when his cousin began heading to Arlington Heights. They talked, one, two, three times while his cousin is figuring out exactly where the drug deal is going to go down.

Not only that, it turned out that when the defendant went to pick up his cousin, he didn't take his car. He used his cousin's car, a car that several relatives said he never, never used before, a car that unbeknownst to him had a secret compartment that had $23,000 in cash inside.

When defendant arrived in Arlington Heights at almost exactly the same time as his cousin and his cousin's broker, as they were negotiating a drug deal, defendant shows up with -- you guessed it -- $23,000, $23,000, about the amount that his drug deal was supposed to be for.

Defendant then goes there and waits, and he only begins to leave just as the DEA and the Arlington Heights police officers arrive on the scene to arrest them. Not only that, the defendant reacts in the worst, the worst possible way. He flees. He hits the police cars. He drives into oncoming traffic. He abandons his car. He hides in McDonald's. He flees again.

Now, ladies and gentlemen, the defendant does not just happen to be the unluckiest guy in the world. All of these things didn't just happen to come down on him out of the worst case of bad luck. There's a very simple reason for everything that happened to defendant that day. What happened to him stems from what the Government has proven to you beyond a reasonable doubt in this case, which is that the defendant, Alexander Vasquez, wanted to buy a kilogram of cocaine with his

cousin, Joel Perez, and he got caught.

Ladies and gentlemen, use your common sense. Joel Perez was in Arlington Heights to buy a kilogram of cocaine. Does it make any sense that Joel Perez would have the defendant bring money to Arlington Heights without the defendant knowing? Does it make sense that Joel Perez would want an unknowing, clueless participant in the deal? Does it make sense that Joel Perez would do all this while keeping a secret from the defendant with all the things that could go wrong?

What was going to happen when the confidential source came back with the cocaine? Was Joel Perez going to turn to Alex Vasquez and say: Hey, Alex, thanks for coming all the way here to Arlington Heights, and do you know what? Thanks for bringing my car. I've got someone coming to meet with me now. Could you just step out of the car and kind of turn around a little bit, kind of look the other way while I finish meeting with him while I check out the stuff he's bringing for me and while I kind of do some stuff to the air bag part of this car?

Does it make sense that the defendant knew exactly what he was doing when he showed up with $23,000 in a hidden compartment in his car? Does it make sense that the defendant knew exactly what he was doing when he waited for the cocaine to arrive? Does this all make sense because he was in on the plan with Joel Perez from the beginning? Is the defendant the unluckiest man in the world? No, he's a guilty man. He's a

guilty man, guilty of the two charges in this case.

Now, defense counsel talked a lot about Carlos Cruz who you saw testify here last week. Now, I expect the Court will explain to you that Carlos Cruz's testimony should be considered with great caution and care because he does have a deal with the Government. You should also consider his testimony with great care and caution because, as he told you, he has lied in the past. But you heard that Carlos Cruz lied only when there was a reason to do so.

He admitted to you that he had lied when he was arrested by law enforcement agents and when they were interviewing him about what had happened. This is just hours afterwards, no deal on the table. He also admitted to you that he lied to this Court about whether law enforcement agents read him his Miranda rights.

But these lies to law enforcement agents and to the Court were made when Carlos Cruz thought he had something to gain. As you heard, he lied about his affidavit because he was hoping that his post-arrest statement would get stricken, and that would hurt the Government's case against him.

Carlos Cruz has no incentive to lie to you here. If he lies now, his deal with the Government is off. If he lies and if his deal is off, he doesn't get the 25 percent off that he talked about and that the defense counsel mentioned, and he doesn't get the 45-month sentence that he's hoping to get. He

can get more time. He can get more than five years. So he has a lot to lose by making up something about the defendant.

Consider how little Carlos Cruz actually told you about the defendant. The only words that Carlos Cruz came in here and told you he recalled hearing the defendant say were: The money is here. Tell him to come here. Te dije. I told you so.

That's it, two, three sentences. Carlos Cruz actually implicates the defendant in this crime less now than he did a year ago when he was talking to law enforcement agents. Defense counsel makes a lot about how Carlos Cruz lied to law enforcement agents in his post-arrest interview, but when he lied he was trying to make up more about Alexander .asquez.

Does it make any sense that he would tell you less now? If Carlos Cruz is lying to you here, if he was acting in complete disregard of the truth, he'd do anything we wanted, anything he could for the Government. It would be exactly the other way around. Carlos Cruz does not come here and say: I was there with the defendant for ten minutes by his car, and he was talking about: I want this cocaine. I hope it's good stuff.

Carlos Cruz does not come here and tell you that he met the defendant in Chicago, as he told the agents a year ago. Carlos Cruz does not say that defendant showed him any money

while they were waiting for the -- while they were talking about money and while they were waiting for this confidential source to come back with the cocaine.

Carlos Cruz does not tell you any of those things because that's not what happened. Carlos Cruz told you that the defendant showed up at the drug deal and that they waited together for at least five minutes. Carlos Cruz told you what happened, what is entirely consistent with the evidence, and what is corroborated by the evidence.

You should take what Carlos Cruz told you and evaluate it in light of all the circumstances in this case. Those circumstances, those facts and circumstances, the other evidence that the Government presented to you throughout this trial, even if you put Carlos Cruz almost completely aside, it's enough to prove that the defendant is guilty beyond a reasonable doubt.

Let's talk some more about the phone records. You know from the telephone records that defendant was on the phone with Joel Perez, his cousin, around the times that Joel Perez was setting up the deal with the confidential source. The Government does not need to prove that there was a specific pattern about the calls. The Government does not need to prove that Alexander Vasquez called Joel Perez or that Joel Perez called Alexander Vasquez. The Government needs to prove, based on all the facts and circumstances, his knowledge, and one

piece of that is the telephone records.

Now, as I mentioned on August 5th, 2008, when Carlos -- just five minutes before on August 5th, 2008, the defendant was talking to Joel Perez at 11:51 a.m., later the same morning that Joel Perez had been talking to Carlos Cruz several times about the drug deal and just minutes before Joel Perez did confirm that the deal was going to be on.

More than that, there are calls later that day in the late afternoon, starting at 5:05 when Joel Perez is in the car with Carlos Cruz heading to Arlington Heights. As Joel Perez is getting a better sense of where they're going, where the deal is going to be, he's talking to Alexander Vasquez.

Now, the Government does not need to prove that every single one of those calls was about drugs. We don't need to prove who called whom at particular times. But these calls show you that there was plenty of opportunity for Alexander Vasquez to know what was going on. Along with the other evidence, that shows you that he did, in fact, know what was going on.

We know from the agents, the law enforcement agents, that the defendant showed up in Arlington Heights at exactly the right time and at exactly the right place for this drug deal. In fact, defendant showed up at almost exactly the same spot that Agent Chupik went to. Agent Chupik wanted to watch the deal, and so did defendant.

You know from the agents from one of the stipulations that was read to you that the defendant had $23,000 in a hidden compartment in the car, which you know is enough money to buy a kilogram of cocaine. You know that from the recordings that you heard.

You also know from the telephone records that the defendant waited for Joel Perez and Carlos Cruz for at least five minutes and maybe ten minutes after Cruz finished talking with the confidential source and before the DEA showed up. Now, Carlos Cruz, you know that Perez called Cruz over, to come from the Shell gas station over to the car where the defendant and Perez were, and you know that because you could see it. You heard that, but you also could see it in the telephone records, Call 65, Cruz-Perez, 5:32 p.m.

You know the confidential source called Cruz shortly thereafter to see what was going on with the deal what was happening, and you know that Cruz told the source to bring the cocaine back and that the money was there. You know when this call happened, Call 66, 5:34 p.m.

Now, some time goes by after that. How much time? Well, you heard from Agent Chupik and Detective Hayes that plans were changing and that it took them some time to adjust. They planned to do the arrest at a nearby apartment complex, and they had people stationed there.

Now, when they realized that Joel Perez and the other

people in the drug deal weren't going to the apartment complex, they had to come over there. It took them some time to get organized and change gears. It took them at least five or so minutes. You know it took that much time also because of the gap in the phone records

Agent Chupik told you that after Cruz got arrested Agent Chupik saw that there was a telephone call from the confidential source on Cruz's phone, and here that call is, Call 67, 5:48 p.m. So that gap is important because it shows you that there's at least five minutes, maybe ten minutes, maybe more, between the time that Carlos Cruz, Joel Perez, and the defendant were changing the deal, changing how the deal was going to go down and when the arrest actually happened.

You don't need recordings to know what Carlos Cruz, Joel Perez, and the defendant were doing while they were waiting. You don't need recordings to know that there was, as Carlos Cruz told you, some talk about the deal while the defendant was there.

You know from the agents that the defendant fled from the parking lot, that he ran into two police cars, that he rushed into oncoming traffic, that he hid in McDonald's after abandoning his car, then fled from the McDonald's.

There may be differences in recollection about how the collision exactly went, exactly what angle cars were hit, but it doesn't change this. First of all, this is not a case

about -- this is not a negligence lawsuit, and nothing changes the fact that he did flee, that defendant did flee into oncoming traffic and that he continued to flee.

In terms of his flight, this is not a case where someone blew out of town six months after being charged with a crime. This is not a case where someone committed a crime a long time before and had no idea that the police were on to him. This is a case where the defendant was caught in the middle of a crime, and he knew exactly what he had done, he knew exactly what was happening, he knew exactly what was about to happen, and that's why he fled.

When you consider all of these things, all these pieces of evidence, when you consider all the things that defendant did knowingly -- excuse me. When you consider everything the defendant did and when you consider whether he did these things knowingly, you should consider his conduct and you should consider all the facts and circumstances of this case.

As I suspect the Judge will instruct you as to defendant's knowledge, as to his intent, as to the absence of mistake or accident, as to his modus operandi, you can consider along with all the other evidence you've heard, you can consider the evidence of what the defendant was doing in 2002.

You can consider the evidence that Detective Raysby came in and told you, about how the defendant back in 2002

committed a crime, committed a crime that the defendant had previously -- committed a crime similar to this one, committed a crime involving cocaine, involving the same partner as involved in this crime, using a car that was registered in another relative's name, and using the same kind of hidden compartment in the same location in the car.

It's precisely because of all of this evidence that you know beyond a reasonable doubt that defendant was not merely present when this drug deal went down. He didn't just happen to be there. He wasn't just walking along and happened upon this drug deal.

Now let's talk about Marina Perez. The defendant through the defense does not have to put on a case, but when he does you can and should look at it to see if it makes sense and is believable. Just as you should carefully consider the testimony of Carlos Cruz and every other witness, you should carefully consider Marina Perez, her testimony and her credibility.

Ladies and gentlemen, you now know that Marina Perez was not giving you the whole story. When you consider her testimony, as you consider her testimony, I suspect the Judge will provide you instructions that you should consider her bias, her interest, her prejudice, the manner in which she testified, and the reasonableness of her testimony in light of all of the evidence in the case.

Bias, let's talk about bias. Marina Perez is not some disinterested party here. Her husband is very close to the defendant. He was talking to him all the time, as she told you. She has known defendant herself for seven years, and he used to be her next door neighbor. She herself went very frequently, at least four times a week, to defendant's house as of last summer, and she lived and continues to live next door to the Vasquez family.

Moreover, when you think about her state of mind, she is expecting some benefit from her testimony here. She believes, rightly or wrongly, that the defense is going to make certain motions on behalf of her husband at sentencing and that the defense was guaranteeing her husband a lower sentence.

Now, she quibbled about this on the stand, but you heard Mrs. Perez herself on the recordings. She had no reason to lie. Mrs. Perez may like the defense, or she may hate the defense. She may have changed her view over time, but that doesn't matter. What matters is whether you found her credible and what her state of mind regarding the defense means to her credibility.

You heard what she said here in court and what she said on those recordings, and you should look at her credibility, her interest, and her bias based upon all the facts and circumstances. So let's talk about the story she told you and whether that story is reasonable in light of the

facts and circumstances.

First, Joel Perez was in Arlington Heights on August 5th, 2008, for one reason, to complete a drug deal. Just as it did not make sense and does not make sense that he would involve an unknowing, clueless participant in his drug deal, it does not make sense that he would invite his wife and the mother of his child to bring money to a drug deal and wait with him while he's going to check out the cocaine.

Drug dealers bring people they trust, people they trust to go along, people they trust to watch their back, to say the right thing and to not say the wrong thing, and keep their cool. You saw Marina Perez. It does not make sense that Joel Perez would be inviting Marina Perez to bring $23,000 to a drug deal.

What does make sense is that the defendant did exactly what he and Joel Perez agreed they would do, which is to have Joel Perez be the front man and to have Alexander Vasquez, the defendant, bring the money to the drug deal and watch Joel Perez's back.

Second, several members of the Vasquez family came here and told you very clearly that to the best of their knowledge Alexander Vasquez never, ever drove the Pontiac Bonneville, and Marina Perez told you that defendant only took the car because it was blocking the defendant's garage that afternoon.

Now, does that make any sense? Does it make any sense that the defendant would think: You know, I could just move Joel's car out of the garage -- out of the driveway and get my car out of the garage and drive out there to pick Joel up. No, I've never driven Joel's car before. How can I let this unique opportunity go by?

It doesn't make any sense. The defendant wouldn't think: You know, I don't understand why Joel's friends can't drive him back from Arlington Heights. I don't understand why Joel didn't take his own car himself. I don't understand why he wanted someone to head out to Arlington Heights at rush hour and pick him when he just left but, sure, I'll go.

What does make sense is that the defendant took exactly the right car for the job he was doing, and he knew exactly why he was doing it. Okay.

Third, the defense wants you to believe that Marina Perez's story fits with the other evidence in the case, that it fits with the telephone records that we talked about, and defense wants you to view this as a critical piece of the jigsaw puzzle. Well, let's look closely at those phone records and the Government's other evidence. Then you'll know that this does not fit with the other evidence, and it does not fit because it was a lie.

All right. Marina Perez's story is that someone picked up Joel Perez from the defendant's house around 4:00

p.m. and that the defendant left soon after to pick Joel Perez up without Joel Perez being involved at all in the decision, but that does't fit with the other evidence.

First, you know that Carlos Cruz did not pick up Joel Perez from the defendant's house. He did not pick him up from 4515 North Mulligan. He picked him up here or around here, around Irving Park and Harlem (indicating). You know that because of the recorded conversations between the confidential source and Carlos Cruz, conversations in which Carlos Cruz talked about how he was going to pick up his customer around Irving Park and Harlem and where he asked the confidential source for directions from that place to I-90 in Arlington Heights.

Secondly, you know that Carlos Cruz does not pick up Joel Perez until after 5:00 p.m. You know this because Carlos Cruz and Joel Perez were still talking to each other until 5:03 p.m. In Call 48, Call 50, 53, 55, 56, 57, they were calling each other because they were still trying to coordinate. Then the calls drop off when they finally get together, when they're finally in the same car headed to Arlington Heights. You also know this from those recorded calls which clearly indicate that Carlos Cruz has still not picked up his customer as of around 4:46 p.m.

All right. Now we have those two things, those two facts. So because of that and with those facts in mind, you

know that defendant actually was in contact with Joel Perez before Joel Perez left for Arlington Heights. Calls 51 and 52, 4:08 and 4:10, are calls after Joel Perez supposedly left the defendant's house and calls that were definitely before he left Chicago.

Marina Perez's story doesn't fit with these facts. When you try to fit her story against these fact, against the recorded calls, against these telephone records which have no incentive to lie, her story does not make any sense.

Does it make any sense that the defendant would leave his home at 4515 North Mulligan Avenue and start heading to Arlington Heights while Joel Perez is still at Irving Park and Harlem waiting for Carlos Cruz to pick him up? Does it make any sense that the defendant and Joel Perez are talking while Joel Perez is trying to arrange things with Carlos Cruz and while they're en route and not talk about why this trip was happening or why Joel Perez needed to take such a complicated roundabout way to get there?

When you fit Marina Perez's story in with all the other evidence, you have one person taking Joel Perez from 4515 North Mulligan to Irving Park and Harlem, you have Carlos Cruz picking him up at Irving Park and Harlem and taking him to Arlington Heights, and then Joel Perez needing a third person, Marina Vasquez possibly or Alexander Vasquez, to pick him up. This is all, of course, while he had the car and had the money

he actually needs to make the drug deal happen.

Marina Perez's story does not explain why Joel Perez and the defendant were talking while they were en route to Arlington Heights. Her story does not explain why defendant just sat there while Joel Perez and Carlos Cruz continued to work out the deal with the confidential source as they were waiting in Arlington Heights. Her story does not explain why the defendant continued to wait for five, ten minutes for the cocaine to come back.

What does make sense is that the defendant and Joel Perez were coordinating with each other throughout August 5th to commit this drug deal and coordinating in a way that the defendant could bring the $23,000 to the deal in the safest manner. What does make sense is that Joel Perez got into Carlos Cruz's car, and the defendant followed them, maybe directly, maybe through all the phone calls they were having with each other while Carlos Cruz was driving Joel Perez to Arlington Heights. All that explains how Joel Perez, Carlos Cruz, and the defendant managed to arrive in Arlington Heights at the scene of the drug deal at the same time and at the same place.

Now, finally, Marina Perez's own unguarded, honest words put the lie to the story she told you here in court. You heard the calls between Marina Perez and her husband, and they talked about what was going on. There's no evidence that she

ever said anything in those calls or any other calls like: I'm so sorry that Alex got into this mess. It should have been me. How can you do this to your cousin? If only there is some way we can clear him without hurting you now.

No, what you heard in these calls was Marina Perez saying that defendant was in as much trouble as Joel Perez. That was what Marina Perez was saying a month ago, at a time when she had no reason to lie and when she's talking to someone she had no reason to lie to. What she said a month ago is completely inconsistent with the story she told you here in court.

Don't believe what Marina Perez told you. Don't believe her story. Don't believe her story because it doesn't fit with the other evidence in this case, because it doesn't actually make any sense, because it's contradicted by her own prior statements in conversations where there would have been no incentive to lie, and because what she told you, in fact, was a lie. Don't let Marina Perez distract you. Focus on the facts. Focus on the evidence.

Ladies and gentlemen, all of the evidence in this case, the evidence about the defendant's own conduct and about the facts and circumstances and everything in this case, all of that has proven beyond a reasonable doubt that Alexander Vasquez, the defendant, was conspiring with Joel Perez and Carlos Cruz to possess cocaine with the intent to distribute it

and that Alexander Vasquez attempted to possess cocaine with the intent to distribute it.

Because the defendant was coordinating with Perez just as Perez was coordinating with Carlos Cruz and the confidential source, because the defendant brought $23,000 to the drug deal, because no one was going to trust $23,000 to someone who doesn't know what's going on, because the defendant arrived at the drug deal at exactly the right time and exactly the right place to make this deal go forward, because the defendant and Joel Perez both told Carlos Cruz the deal is going with the confidential source, because the defendant waited for Cruz's supplier to come back or for the confidential source to come back with the cocaine, because the defendant fled not once but twice, because of all of these facts and circumstances surrounding defendant's own actions and his own mistakes, you know that Alexander Vasquez knew exactly what he was doing when he brought $23,000 to this drug deal. You know that Alexander Vasquez is guilty. You know he's guilty beyond a reasonable doubt of Count 1 in the indictment and Count 2 in the indictment. Thank you.

THE COURT: Members of the jury, you have seen and heard all the evidence and the arguments of the attorneys. Now I will instruct you on the law. You have two duties as a jury. Your first duty is to decide the facts from the evidence in the case. This is your job and yours alone. Your second duty is

to apply the law that I give you to the facts. You must follow these instructions even if you disagree with them. Each of the instructions is important, and you must follow all of them.

Perform these duties fairly and impartially. Do not allow sympathy, prejudice, fear, or public opinion to influence you. You should not be influenced by any person's race, color, religion, national ancestry, or sex. Nothing I say to you now and nothing I said or did during the trial is meant to indicate any opinion on my part about what the facts are or about what your verdict should be.

The evidence consists of the testimony of the witnesses, the exhibits admitted in evidence, and stipulations. A stipulation is an agreement between both sides that certain facts are true or that a person would have given certain testimony.

You are to decide whether the testimony of each of the witnesses is truthful and accurate in part, in whole, or not at all, as well as what weight, if any, you give to the testimony of each witness.

In evaluating the testimony of any witness, you may consider, among other things, the witness' intelligence, the ability and opportunity the witness had to see, hear, or know the things that the witness testified about, the witness' memory, any interest, bias, or prejudice the witness may have, the manner of the witness while testifying, and the

reasonableness of the witness' testimony in light of all the evidence in the case.

You should use common sense in weighing the evidence and consider the evidence in light of your own observations in life. In our lives, we often look at one fact and conclude from it that another fact exists. In law, we call this inference. A jury is allowed to make reasonable inferences. Any inferences you make must be reasonable and must be based upon the evidence in the case.

Some of you have heard the phrases "circumstantial evidence" and "direct evidence." Direct evidence is the testimony of someone who claims to have personal knowledge of the commission of the crime which has been charged, such as an eyewitness. Circumstantial evidence is the proof of a series of facts which tend to show whether the defendant is guilty or not guilty.

The law makes no distinction between the weight to be given either direct or circumstantial evidence. You should decide how much weight to give any evidence. All the evidence in the case, including circumstantial evidence, should be considered by you in reaching your verdict.

Certain things are not evidence. I will list them for you. First, testimony that I struck from the record or that I told you to disregard is not evidence and must not be considered.

Second, anything that you may have seen or heard outside the courtroom is not evidence and must be entirely disregarded. This includes any press, radio, or television reports you may have seen or heard. Such reports are not evidence, and your verdict must not be influenced in any way by such publicity.

Third, questions and objections by the lawyers are not evidence. Attorneys have a duty to object when they believe a question is improper. You should not be influenced by any objection or by my ruling on it.

Fourth, the lawyer's statements to you are not evidence. The purpose of these statements is to discuss the issues and the evidence. If the evidence as you remember it differs from what the lawyers said, your memory is what counts.

It is proper for an attorney to interview any witness in preparation for trial. You may find the testimony of one witness or a few witnesses more persuasive than the testimony of a larger number. You need not accept the testimony of the larger number of witnesses.

The indictment in this case is the formal method of accusing the defendant of offenses and placing the defendant on trial. It is not evidence against the defendant and does not create any inference of guilt.

Count 1 of the indictment charges the defendant with conspiring to possess with the intent to distribute a

controlled substance. Count 2 of the indictment charges the defendant with attempting to possess with intent to distribute a controlled substance.

The defendant has pleaded not guilty to the charges. The defendant is presumed to be innocent of each of the charges. This presumption continues during every stage of the trial and your deliberations on the verdict. It is not overcome unless from all the evidence in the case you are convinced beyond a reasonable doubt that the defendant is guilty as charged.

The Government has the burden of proving the guilt of the defendant beyond a reasonable doubt. This burden of proof stays with the Government throughout the case. The defendant is never required to prove his innocence or to produce any evidence at all. The defendant has the absolute right not to testify. The fact that a defendant did not testify should not be considered by you in any way in arriving at your verdict.

You have heard evidence of acts of the defendant other than those charged in this indictment. You may consider this evidence only on the question of the defendant's knowledge, intent, absence of mistake or accident, identity, and modus operandi. You should consider this evidence only for this limited purpose.

You have heard testimony of an identification of a person. Identification testimony is an expression of belief or

impression by the witness. You should consider whether or to what extent the witness had the ability and opportunity to observe the person at the time of the offense and to make a reliable identification later. You should also consider the circumstances under which the witness has made the identification.

The Government has the burden of proving beyond a reasonable doubt that the particular defendant you are considering was the person who committed the crime charged.

You have heard evidence that before the trial witnesses made statements that may be inconsistent with the witnesses' testimony here in court. If you find that it is inconsistent, you may consider the earlier statement only in deciding the truthfulness and accuracy of that witness' testimony in this trial. If that statement was made under oath, you may also consider it as evidence of the truth of the matters contained in that prior statement.

You have heard evidence that Carlos Cruz has been convicted of a crime. You may consider this evidence only in deciding whether Carlos Cruz's testimony is truthful in whole, in part, or not at all. You may not consider this evidence for any other purpose.

You have heard testimony from Carlos Cruz, who received benefits from the Government in connection with this case, a plea agreement calling for a reduced sentence in

exchange for cooperation, stated that he was involved in the commission of the offense as charged against the defendant and has pleaded guilty to an offense arising out of the same occurrence for which the defendant is now on trial. His guilty plea is not to be considered as evidence against the defendant. You may give his testimony such weight as you feel it deserves, keeping in mind that it must be considered with caution and great care.

Among the exhibits that were admitted during the trial were recordings that contained conversations in the Spanish language. You were also provided with English transcripts of those conversations. The transcripts were provided to you by the Government so that you could consider the content of the conversations on the recording.

The parties have stipulated that the transcripts are accurate. You should not rely in any way on any knowledge you may have of the language spoken on the recordings. Your consideration of the transcripts should be based upon the evidence introduced in the trial.

You have evidence in this case regarding intentional flight from law enforcement. Intentional flight by a person immediately after a crime has been committed is not sufficient by itself to establish the guilt of that person. However, you may consider the -- you may consider evidence of intentional flight in light of all the other evidence presented when

determining whether the Government has proven its case beyond a reasonable doubt.

Evidence of flight should be viewed cautiously and given careful deliberation. In determining the appropriate weight to give this evidence in your determination, you should consider the following factors: whether the defendant intentionally fled from the law enforcement officers, whether this flight occurred because of conscious guilt or for some other purpose, whether any such guilt came from the crime charged in this case or from some other concern, and whether the flight gives any actual insight into whether the defendant committed the charged crime.

The indictment charges that the offenses were committed on or about certain dates. The Government must prove that the offenses happened reasonably close to those dates but is not required to prove that the alleged offenses happened on those exact dates.

When the word "knowingly" or the phrase "the defendant knew" is used in these instructions, it means that the defendant realized what he was doing and was aware of the nature of his conduct and did not act through ignorance, mistake, or accident. Knowledge may be proved by the defendant's conduct and by all the other facts and circumstances surrounding the case.

An offense may be committed by more than one person.

A defendant's guilt may be established without proof that the defendant personally performed every act constituting the crime charged.

Count 1. A conspiracy is an agreement between two or more persons to accomplish an unlawful purpose. To sustain the charge of conspiracy, the Government must prove: first, that the conspiracy as charged in Count 1 of the indictment existed and, second, that the particular defendant you are considering knowingly became a member of the conspiracy with an intention to further the conspiracy.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty. If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

To be a member of the conspiracy, a defendant need not join at the beginning or know all of the other members or the means by which its purpose was to be accomplished. The Government must prove beyond a reasonable doubt that a defendant was aware of the common purpose and was a willing participant.

In deciding whether the charged conspiracy exists, you may consider the actions and the statements of every one of

the alleged participants. An agreement may be proved from all of the circumstances and the words and conduct of all the alleged participants which are shown by the evidence.

A conspirator is responsible for the offense committed by his fellow conspirators if he was a member of the conspiracy when the offense was committed and if the offense was committed in furtherance of and as a foreseeable consequence of the conspiracy.

Therefore, if you find a defendant guilty of the conspiracy charged in Count 1 and if you find beyond a reasonable doubt that while he was a member of the conspiracy his fellow conspirators committed the offense in Count 1 in furtherance of and as a foreseeable consequence of that conspiracy, then you should find him guilty of Count 1.

To establish the existence of the conspiracy charged in Count 1, the Government need not establish that the persons charged met together and entered into an agreement which was express or formal or that the participants spelled out what the scheme was or how it was to be carried out. A conspiracy may be proved by circumstantial evidence and reaasonable inferences drawn therefrom concerning the relationship of the parties, their overt acts, and the totality of their conduct.

The Government need not prove that a defendant knew each detail of the conspiracy or that a defendant played more than a minor role in the conspiracy. A defendant need not have

participated in all of the events of the charged conspiracy to be a member of that conspiracy.

A defendant's association with the conspirators is not by itself sufficient to prove his participation or membership in a conspiracy. If a defendant performed acts that advanced a criminal activity but had no knowledge that the crime was being committed or was about to be committed, those acts alone are not sufficient to establish the defendant's guilt. A conspiracy may be established even if its purpose was not accomplished.

The Government is not required to prove that the conspiracy charged in Count 1 involved the specific quantity of controlled substance alleged in that count. However, the Government must prove that the conspiracy charged in Count 1 involved a measurable quantity of some type of controlled substance.

Count 1 charges a conspiracy to possess with intent to distribute a controlled substance, namely, mixtures and substances containing cocaine. It is not necessary for the Government to prove that the particular defendant you are considering knew that the conspiracy involved cocaine. It is sufficient if the Government proves beyond a reasonable doubt that the defendant knew that the conspiracy involved some type of controlled substances. You are instructed that mixtures and substances containing cocaine are a controlled substance.

Intent to distribute can be inferred from the possession of a quantity of a controlled substance larger than needed for personal use.

A defendant charged with conspiracy in the indictment can be convicted in the alternative as an aider and abetter of that conspiracy. A defendant is guilty of aiding and abetting a charged conspiracy if he or she tries to help the conspiracy succeed by committing an act in furtherance of the conspiracy and had the knowledge of the conspiracy's purpose at the time he or she commits the act. One can aid and abet a conspiracy without necessarily participating in the original agreement. One who aids and abets a conspiracy is guilty of conspiracy.

Count 2. To sustain the charges in Count 2 of the indictment, the Government must prove the following propositions: first, that the particular defendant you are considering attempted to knowingly or intentionally possess a controlled substance and, second, that the particular defendant you are considering attempted to possess the controlled substance with the intent to deliver it to another person.

It does not matter whether the defendant knew the substance was mixtures and substances containing a particular type of controlled substance. It is sufficient that the defendant knew that it was some kind of prohibited drug.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond

a reasonable doubt as to a particular defendant you are considering, then you should find that defendant guilty. If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt as to the defendant, then you should find the defendant not guilty.

To commit the offense of attempt to possess a controlled substance with intent to distribute, a defendant need not complete the act of possession. It is enough if the defendant intended to obtain delivery of a controlled substance and took a substantial step towards obtaining a controlled substance.

The Government is not required to prove that the count charging attempt to possess a controlled substance with intent to distribute involved the specific quantity of controlled substances alleged in that count. However, for that count the Government must prove that the defendant attempted to possess some measurable quantity of a prohibited drug. Intent to possess a controlled substance can exist even where there aren't controlled substances to be had. The Government need not prove that any real controlled substances were involved in this case.

In the efforts to detect violations of the law, it is sometimes necessary for the Government to use ruses, disguises, subterfuge, and employ investigative techniques that deceive.

It is not improper or illegal for the Government to use these techniques which are a permissible and recognized means of criminal investigation. Whether or not you approve of the use of such investigative techniques to detect unlawful activities is not to enter into your deliberations in any way.

If you are satisfied beyond a reasonable doubt that the defendant committed the offense charged in the indictment, the fact that the Government made use of investigative techniques that deceive is not relevant to your determination.

You should not speculate why any other person whose name you may have heard during the trial is not currently on trial before you. If you find the defendant you are considering guilty, it will then be my job to decide what punishment should be imposed. In considering the evidence and the arguments that have been given during the trial, speculation concerning the punishment should not enter in your consideration or discussions at any time.

Upon retiring to the jury room, select one of your number as a foreperson. The foreperson will preside over your deliberations and will be your representative here in court. A form of verdict has been prepared for you. I will shortly read that verdict to you. Take this form to the jury room, and when you have reached unanimous agreement on the verdict, your foreperson will fill in and date the form and each of you will

sign it.

Each count of the indictment charges the defendant with having committed a separate offense. Each count and the evidence relating to it should be considered separately, and a separate verdict should be returned as to each count. Your verdict of guilty or not guilty of an offense charged in one count should not control your decision as to any other count.

I do not anticipate that you will need to communicate with me. If you do, however, the only proper way is in writing signed by the foreperson or, if he or she is unwilling to do so, by some other juror and given to the marshal. I caution you, however, that you should never state or specify your numerical division in any note or message that you send to me.

The verdict must be represent the considered judgment of each juror. Your verdict, whether it be guilty or not guilty, must be unanimous. You should make every reasonable effort to reach a verdict. In doing so, you should consult with one another, express your own views, and listen to the opinions of your fellow jurors.

Discuss your differences with an open mind. Do not hesitate to reexamine your own views and change your opinion if you come to believe it is wrong, but you should not surrender your honest beliefs about the weight or effect of the evidence solely because of the opinions of your fellow jurors or for the purpose of returning a unanimous verdict.

The verdict -- excuse me. The 12 of you should give fair and equal consideration to all the evidence and deliberate with a goal of reaching an agreement which is consistent with the individual judgment of each juror. You are the impartial judges of the facts. Your sole interest is to determine whether the Government has proved its case beyond a reasonable doubt. The verdict reads as follows:

"Verdict Form.

"Count 1. With respect to Count 1 of the indictment, we, the jury, find as to defendant Alexander Vasquez, Jr., guilty" -- blank -- "not guilty" -- blank.

"If you find Alexander Vasquez, Jr., guilty with respect to Count 1, answer the follow interrogatory. We, the jury, find that the amount of controlled substance that has been proved beyond a reasonable doubt with respect to Alexander Vasquez in Count 1 is as marked below: 500 grams or more of mixtures and substances containing cocaine" -- blank -- "less than 500 grams of mixtures and substances containing cocaine" -- blank.

"Count 2. With respect to Count 2 of the indictment, we, the jury, find as follows as to defendant Alexander Vasquez, Jr., guilty" -- blank -- "not guilty" -- blank.

"If you find defendant Alexander Vasquez guilty with respect to Count 2, answer the following interrogatory. We, the jury, find that the amount of controlled substance that has

been proved beyond a reasonable doubt with respect to Alexander Vasquez in Count 2 is as marked below: 500 grams or more of mixtures and substances containing cocaine" -- blank -- "less than 500 grams of mixtures and substances containing cocaine" -- blank.

Then there are spaces for each one of you to sign, including your foreperson, and a place for a date.

All right, members of the jury. You may go in to deliberate.

Please swear in the marshal, Mr. Fulbright.

(Marshal duly sworn.)

THE COURT: Along with the jury instructions and verdict form, I have included the indictment itself. Mr. Fulbright, give this to the marshal to give to the jury.

Members of the jury, you may go in to deliberate, and shortly you will receive the evidence, the exhibits and any other evidence that was received during the course of trial. You may leave.

(Jury out.)

THE COURT: All right. The jury has left the room. Court is in session. Do you have all of the evidence assembled?

MR. LEE: Yes, Your Honor.

THE COURT: You have it all assembled?

MR. LEE: Yes, over in the box.

MR. BRINDLEY: Your Honor, I need to include my defense exhibits with the Government's exhibits.

THE COURT: What exhibits do you have?

MR. BRINDLEY: There were photographic exhibits of the vehicles that were admitted into evidence.

THE COURT: Okay.

MR. BRINDLEY: And the defense's own summary chart as well as the driver's license and a billing statement for the Toyota owned by the defendant.

THE COURT: All right. All of the evidence that was received during the course of the trial and already considered by the jury should be taken in to them. Put that all in the same box, and it shall then be taken in to the jury right now.

MR. LEE: Yes, Your Honor.

THE COURT: Okay. If you do intend to leave the area, make sure you give a telephone number to Mr. Fulbright in the event we need to call you quickly for one reason or another. The Court will take a recess.

(Recess.)

THE COURT: All right. The defendant is personally present. It's three minutes till 5:00. I received a note from the marshal which states:

"Judge Norgle, the jurors would like to leave for the evening and reconvene in the a.m. at 9:00 a.m due to some members needing to catch their Metra trains, and we are not

close to a verdict.

"2. How late will you allow us to stay tomorrow evening, if needed?

"3. If possible, may we have a dry erase board with markers, please?

"Thank you in advance," and I think it's Cole.

All right. Certainly we will let them leave and return tomorrow at 9:00. I don't think we should answer the second question at all, but you have the right to be heard on that. The question is:

"How late will you allow us to stay tomorrow evening, if needed?"

I think there's a danger in answering that.

MR. BRINDLEY: I guess I don't really have a position on it either way, Your Honor.

THE COURT: Okay. What's the Government's position?

(Discussion off the record.)

MR. LEE: I think the Government thinks there might be a danger as well. Maybe we should just put it off, and it might become a moot point.

THE COURT: The third one, as far as this dry erase board, we will answer yes, to give them that or the functional equivalent.

MR. BRINDLEY: Where is it coming from?

THE COURT: We'll get it somehow.

MR. BRINDLEY: Thank you.

THE COURT: We should ask the jury to come in, and I will respond to these questions.

MR. LEE: Thank you, Your Honor.

(Jury in.)

THE COURT: It's about 5:00 o'clock. Members of the jury, you are excused for the day and are to return tomorrow morning at 9:00 o'clock as you have requested, but you are not to begin your deliberations until all 12 of you are together.

As to the second question, it will remain unanswered.

The third question requesting the dry erase board with markers, we will get that for you or the functional equivalent of one.

You are excused for the day with the usual admonitions.

(Jury out.)

THE COURT: Court is in session only to adjourn.

MR. BRINDLEY: Thank you, Your Honor.

(Proceedings adjourned to 9:00 a.m., September 3, 2009.)

C E R T I F I C A T E

I, Patrick J. Mullen, do hereby certify that the foregoing is a complete, true, and accurate excerpt of the transcript of proceedings had in the above-entitled case before the Honorable CHARLES R. NORGLE, SR., one of the judges of said court in Chicago, Illinois, on September 2, 2009.

/s/ Patrick J. Mullen

Official Court Reporter

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	08 CR 625
	)	
vs.	)	Chicago, Illinois
	)	September 3, 2009
ALEXANDER VASQUEZ,	)	10:30 a.m.
	)	
Defendant.	)	

VOLUME 7
TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE CHARLES R. NORGLE, SR.
AND A JURY

APPEARANCES:

For the Plaintiff:	OFFICE OF THE U.S. ATTORNEY 219 South Dearborn Street 5th Floor Chicago, Illinois 60604 BY: MR. STEPHEN CHAHN LEE MS. KRUTI TRIVEDI
For the Defendant:	LAW OFFICES OF BEAU B. BRINDLEY 53 West Jackson Boulevard Suite 1605 Chicago, Illinois 60604 BY: MR. BEAU B. BRINDLEY MS. BLAIR WESTOVER
Court Reporter:	MAELLEN E. PITTMAN Official Court Reporter 219 South Dearborn Street Room 2342 Chicago, Illinois 60604 (312) 435-5576

(Proceedings heard in open court. Jury out. Defendant out.)

THE COURT: We will wait until the defendant is in court to go into this issue more substantively, but I want to give you an opportunity to think about this so that we will not be wasting any time.

A note from the jury given to me just a few minutes ago: "Judge Norgle: May we receive the transcripts of Marina Perez's testimonies, please? Thank you in advance for your consideration." And I think that it is Mr. Cole.

So think about it. And when the defendant is in court, then you may be heard on the issue and I will make a ruling.

MR. LEE: Thank you, your Honor.

THE COURT: Let me know when he comes in, Eric.

(Recess.)

THE CLERK: 08 CR 625, United States versus Alexander Vasquez, Jr.

THE COURT: All right. The defendant is also personally present.

Once again, the note states: "May we receive the transcripts of Marina Perez's testimonies, please? Thank you in advance for your consideration." And I think it's signed by Mr. Cole, 9-3-09.

THE COURT: What is the defendant's position?

MR. BRINDLEY: It is our position on the issue of transcripts, is the same position I have in every case, and that is a transcript should not be provided.

The reason being that, one, the provision of transcripts requires, first, the redaction of all questions and side bars, objections, all those kinds of problems, which could confuse the jury, and to have to come out.

And, secondly, in my experience anytime juries are granted a transcript, immediately the next thing they think is they want a different transcript, and you end up in an endless situation where they are asking for one thing and then another because they believe they can get it.

It is my position that the jury should be told to rely on their collective memories of the testimony, which is the standard situation and rule that is followed on this issue.

THE COURT: What is the government's position?

MR. LEE: The government agrees with the defendant on this, with defense counsel and his point. We believe that the jury should be told to rely on their memory of the testimony.

THE COURT: I think we should also make a record on this particular point.

Miss Pittman, how long would it take for the preparation of the transcripts of all of the testimonies of Marina Perez? How long would it take to prepare that?

THE COURT REPORTER: It has been done. The

redactions would have to be done.

THE COURT: So the redactions would take, what, an hour or so?

THE COURT REPORTER: I can't remember how many we are talking about.

THE COURT: But the transcript could be available during the course of the afternoon.

THE COURT REPORTER: Yes.

THE COURT: All right. But if it is the position of the defense as well as the prosecution, the Court should certainly take that into account.

The Court does have discretion, notwithstanding that the parties may reach an agreed position.

But I will, under the circumstances in this case, and in the exercise of my discretion, advise the jury that their request for transcripts are denied, and to rely on their collective memories of what Mrs. Marina Perez said while on the witness stand.

I do, however, want to say to the jury that the Court conducted a hearing on this issue. I'm not going to tell them, obviously, whether you agreed or didn't agree, but to let them know the Court did conduct a hearing, and after the hearing the ruling of the Court is that the transcripts will not be provided, and that the jury should rely on their collective recollection of what she said while on the witness stand.

Any further comments?

MR. BRINDLEY: Nothing else from the defense, your Honor.

THE COURT: Are there any further comments?

MR. LEE: No further comments, your Honor.

THE COURT: Did you confer with your client, counsel?

MR. BRINDLEY: I have, your Honor.

THE COURT: You have discussed this with him?

MR. BRINDLEY: Yes.

THE COURT: And he is here right now.

MR. BRINDLEY: Yes, he is.

THE COURT: All right. Thank you.

So we will send that kind of note into the jury. And I have already said to the marshal that when the jury is ready for lunch, if they want to go to lunch, that they will go to lunch in the cafeteria, but to wait to hear from the jury as to what they want to do in terms of having a lunch.

Okay. Thank you.

MR. BRINDLEY: Yes, your Honor. Thank you.

(Proceedings recessed with jury in deliberation.)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	08 CR 625
	)	
vs.	)	Chicago, Illinois
	)	September 3, 2009
ALEXANDER VASQUEZ,	)	4:35 p.m.
	)	
Defendant.	)	

VOLUME 7
TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE CHARLES R. NORGLE, SR.
AND A JURY

APPEARANCES:

For the Plaintiff:	OFFICE OF THE U.S. ATTORNEY 219 South Dearborn Street 5th Floor Chicago, Illinois 60604 BY: MR. STEPHEN CHAHN LEE MS. KRUTI TRIVEDI
For the Defendant:	LAW OFFICES OF BEAU B. BRINDLEY 53 West Jackson Boulevard Suite 1605 Chicago, Illinois 60604 BY: MR. BEAU B. BRINDLEY MS. BLAIR WESTOVER
Court Reporter:	MAELLEN E. PITTMAN Official Court Reporter 219 South Dearborn Street Room 2342 Chicago, Illinois 60604 (312) 435-5576

(Proceedings heard in open court. Jury out.)

THE CLERK: Bring the defendant in, please.

THE COURT: It is about 4:35. The defendant is personally present. Counsel are present.

A note: "Judge Norgle: We have reached a decision on both counts of the indictment." I think it's signed by Mr. Cole, September 3rd, 2009.

I have asked the jury to come in.

MR. LEE: Judge, before we bring the jury in, this, of course, may be moot, but we have submitted proposed forfeiture jury instructions and a proposed waiver form. And in light of the forfeiture allegations in this case, I'm not sure if you want to address this now or --

THE COURT: What is the defendant's position, if there is a verdict of guilty?

MR. BRINDLEY: One moment, your Honor.

(Pause.)

MR. BRINDLEY: We would waive any jury finding on forfeiture, if that's an issue, your Honor.

THE COURT: All right.

MR. LEE: I have a form that we can sign off on.

(Jury in.)

THE COURT: All right. Members of the jury, I have received your note.

Who will speak for the jury?

THE FOREPERSON: I will.

THE COURT: Your name, please?

THE FOREPERSON: Donald Cole.

THE COURT: Mr. Cole, has the jury reached a verdict?

THE FOREPERSON: It has.

THE COURT: Would you please rise and read the verdict into the record.

THE FOREPERSON: Count 1. With respect to Count 1 of the indictment, we, the jury, find as follows as to Defendant Alexander Vasquez, Jr.

Guilty.

We, the jury, find that the amount of controlled substance that has been proven beyond a reasonable doubt with respect to Alexander Vasquez in Count 1 is as marked below.

Five hundred grams or more of mixtures and substances containing cocaine.

With respect to Count 2 of the indictment, we, the jury, find as follows as to defendant Alexander Vasquez, Jr.

Not guilty.

THE COURT: Would you please give the verdict to the marshal.

Is there a motion to poll the jury?

MR. BRINDLEY: Yes, your Honor.

THE COURT: The clerk will poll the jury.

THE CLERK: David Behling, was this and is this now

your verdict?

JUROR BEHLING: Yes.

THE COURT: Steven Benford, Jr., was this and is this now your verdict?

JUROR BENFORD: Yes.

THE CLERK: Donald Cole, was this and is this now your verdict?

JUROR COLE: Yes.

THE CLERK: Priscilla Davila, was this and is this now your verdict?

JUROR DAVILA: Yes.

THE CLERK: Vanessa Jennings, was this and is this now your verdict?

JUROR JENNINGS: Yes.

THE COURT: Kenneth LeBreux, was this and is this now your verdict?

JUROR LE BREUX: Yes.

THE COURT: Tyrone Lee, was this and is this now your verdict?

JUROR LEE: Yes.

THE CLERK: Richard Olivera, was this and is this now your verdict?

JUROR OLIVERA: Yes.

THE CLERK: Bianca Ortiz, was this and is this now your verdict?

JUROR ORTIZ: Yes.

THE CLERK: Kenneth Poteracki, was this and is this now your verdict?

JUROR POTERACKI: Yes.

THE CLERK: Kyle Satz, this and is this now your verdict?

JUROR SATZ: Yes.

THE CLERK: Kelly Volkmar, was this and is this now your verdict?

JUROR VOLKMAR: Yes.

THE CLERK: So say you all?

THE JURY: Yes.

THE COURT: All right. Members of the jury, your work here is completed and you are discharged.

(Jury out.)

THE COURT: Court is in session.

THE CLERK: Please be seated.

THE COURT: We will set the matter for sentencing on November 13th at 10:30.

MR. BRINDLEY: Your Honor, I am on trial in Indianapolis in the Southern District of Indiana on November 13th. It is scheduled to begin November 4th, and go for approximately three weeks.

THE COURT: All right. We could set the matter for either November 6th or December 4th.

MR. BRINDLEY: December 4th, your Honor.

THE COURT: All right. December 4th for sentencing at 10:30.

MR. BRINDLEY: Your Honor, on behalf of Mr. Vasquez, can I request an extension of 30 days to file post-trial motions?

THE COURT: 30 days?

MR. BRINDLEY: I'd like to file my post-trial motions and have extended the deadline to 30 days from today.

THE COURT: Why do you need 30 days?

MR. BRINDLEY: Because I have a murder trial coming up, your Honor, that is going to take up my time, and I want to be able to give adequate time to Mr. Vasquez's post-trial motions.

THE COURT: Is there any objection?

MR. LEE: No, your Honor.

THE COURT: Give me a specific date when you say that you want to file post-trial motions.

MR. BRINDLEY: I will have post-trial motions in this case filed by October the 3rd, your Honor.

THE COURT: Did you say 3rd or 30th?

MR. BRINDLEY: October the 3rd.

THE COURT: 3rd?

MR. BRINDLEY: One month from today.

THE COURT: All right. The 3rd is a Saturday.

MR. BRINDLEY: Then can we make it the 5th, your Honor, the Monday following?

THE COURT: All right. So October 5th, a Monday, to file post-trial motions.

The government may respond on or before the 19th.

And any reply on or before the 26th.

Thank you.

MR. BRINDLEY: Thank you, your Honor.

THE COURT: All right. The defendant obviously will remain in custody.

MR. BRINDLEY: Your Honor, could we have the Court's position on whether we can speak to the jurors about the verdict?

THE COURT: Certainly not.

MR. BRINDLEY: Yes, your Honor.

THE COURT: There are post-trial motions you will be filing.

MR. BRINDLEY: Yes.

THE COURT: And no one should speak to the jury, including myself.

MR. BRINDLEY: Very well, your Honor.

THE COURT: All right. Thank you.

MR. LEE: Thank you, your Honor.

THE COURT: All right. The government may re-collect all of the exhibits that were received, and you will keep

custody and control of all of the exhibits until further order of the Court.

MR. LEE: Yes, your Honor.

MS. TRIVEDI: Thank you, your Honor.

THE COURT: All right. Court is adjourned.

(Proceedings adjourned, to reconvene on December 4, 2009, at 10:30 a.m.)

CERTIFICATE

I hereby certify that the foregoing is a true and correct transcript of the proceedings in the above-entitled case.

/S/Maellen E. Pittman
Official Court Reporter

October 4, 2009
Date

SUMMARY OF CALLS

CS-CRUZ	CRUZ -PEREZ	VASQUEZ-PEREZ	PEREZ0452-PEREZ8098

calls	Callers	Target Phone	Date	Adj Time	Number Dialed
1	CS-CRUZ	(773) 386-6161/CS	8/4/2008	04:26:00pm	(773) 865-4913/Carlos CRUZ
2	VASQUEZ-PEREZ0452	(708) 785-6969/Alex VASQUEZ	8/4/2008	05:40:10pm	(773) 910-0452/Joel PEREZ
3	VASQUEZ-PEREZ0452	(708) 785-6969/Alex VASQUEZ	8/4/2008	06:48:59pm	(773) 910-0452/Joel PEREZ
4	VASQUEZ-PEREZ0452	(708) 785-6969/Alex VASQUEZ	8/4/2008	06:14:11pm	(773) 910-0452/Joel PEREZ
5	CRUZ-PEREZ8098	(773) 310-8098/Joel PEREZ	8/4/2008	07:29:15pm	(773) 865-4913/Carlos CRUZ
6	CRUZ-PEREZ8098	(773) 310-8098/Joel PEREZ	8/4/2008	07:31:34pm	(773) 865-4913/Carlos CRUZ
7	PEREZ8098-PEREZ0452	(773) 310-8098/Joel PEREZ	8/4/2008	07:47:06pm	(773) 910-0452/Joel PEREZ
8	VASQUEZ-PEREZ0452	(708) 785-6969/Alex VASQUEZ	8/4/2008	08:49:58pm	(773) 910-0452/Joel PEREZ
9	VASQUEZ-PEREZ0452	(708) 785-6969/Alex VASQUEZ	8/4/2008	08:52:15pm	(773) 910-0452/Joel PEREZ
10	VASQUEZ-PEREZ0452	(773) 910-0452/Joel PEREZ	8/4/2008	09:03:22pm	(708) 785-6969/Alexander VASQUEZ
11	VASQUEZ-PEREZ0452	(708) 785-6969/Alex VASQUEZ	8/4/2008	09:51:46pm	(773) 910-0452/Joel PEREZ
12	VASQUEZ-PEREZ0452	(773) 910-0452/Joel PEREZ	8/4/2008	10:04:53pm	(708) 785-6969/Alexander VASQUEZ
13	VASQUEZ-PEREZ0452	(773) 910-0452/Joel PEREZ	8/4/2008	10:08:49pm	(708) 785-6969/Alexander VASQUEZ
14	VASQUEZ-PEREZ0452	(708) 785-6969/Alex VASQUEZ	8/4/2008	10:10:38pm	(773) 910-0452/Joel PEREZ
15	VASQUEZ-PEREZ0452	(773) 910-0452/Joel PEREZ	8/4/2008	11:03:24pm	(708) 785-6969/Alexander VASQUEZ
16	VASQUEZ-PEREZ0452	(708) 785-6969/Alex VASQUEZ	8/5/2008	08:54:52am	(773) 910-0452/Joel PEREZ
17	VASQUEZ-PEREZ0452	(708) 785-6969/Alex VASQUEZ	8/5/2008	09:36:25am	(773) 910-0452/Joel PEREZ
18	VASQUEZ-PEREZ0452	(773) 910-0452/Joel PEREZ	8/5/2008	09:46:56am	(708) 785-6969/Alexander VASQUEZ
19	VASQUEZ-PEREZ0452	(773) 910-0452/Joel PEREZ	8/5/2008	10:12:56am	(708) 785-6969/Alexander VASQUEZ
20	CS-CRUZ	(773) 386-6161/CS	8/5/2008	10:27:00am	(773) 865-4913/Carlos CRUZ
21	VASQUEZ-PEREZ0452	(708) 785-6969/Alex VASQUEZ	8/5/2008	11:16:17am	(773) 910-0452/Joel PEREZ
22	CRUZ-PEREZ8098	(773) 310-8098/Joel PEREZ	8/5/2008	11:33:15am	(773) 865-4913/Carlos CRUZ
23	CRUZ-PEREZ0452	(773) 910-0452/Joel PEREZ	8/5/2008	11:35:19am	(773) 865-4913/Carlos CRUZ
24	CRUZ-PEREZ8098	(773) 310-8098/Joel PEREZ	8/5/2008	11:38:58am	(773) 865-4913/Carlos CRUZ
25	VASQUEZ-PEREZ0452	(773) 910-0452/Joel PEREZ	8/5/2008	11:51:43am	(708) 785-6969/Alexander VASQUEZ
26	CS-CRUZ	(773) 865-4913/Carlos CRUZ	8/5/2008	11:56:00am	(773) 386-6161/CS
27	CRUZ-PEREZ8098	(773) 310-8098/Joel PEREZ	8/5/2008	11:56:41am	(773) 865-4913/Carlos CRUZ
28	CS-CRUZ	(773) 865-4913/Carlos CRUZ	8/5/2008	12:00:30pm	(773) 386-6161/CS
29	VASQUEZ-PEREZ0452	(773) 910-0452/Joel PEREZ	8/5/2008	12:17:25pm	(708) 785-6969/Alexander VASQUEZ
30	VASQUEZ-PEREZ0452	(708) 785-6969/Alex VASQUEZ	8/5/2008	12:20:08pm	(773) 910-0452/Joel PEREZ
31	VASQUEZ-PEREZ0452	(708) 785-6969/Alex VASQUEZ	8/5/2008	12:31:05pm	(773) 910-0452/Joel PEREZ
32	VASQUEZ-PEREZ0452	(708) 785-6969/Alex VASQUEZ	8/5/2008	12:36:11pm	(773) 910-0452/Joel PEREZ
33	VASQUEZ-PEREZ0452	(773) 910-0452/Joel PEREZ	8/5/2008	12:52:39pm	IN- (708) 785-6969/Alexander VASQUEZ
34	VASQUEZ-PEREZ0452	(708) 785-6969/Alex VASQUEZ	8/5/2008	12:54:34pm	(773) 910-0452/Joel PEREZ
35	CRUZ-PEREZ0452	(773) 865-4913/Carlos CRUZ	8/5/2008	12:55:00pm	(773) 910-0452 Joel PEREZ
36	VASQUEZ-PEREZ0452	(773) 910-0452/Joel PEREZ	8/5/2008	01:08:05pm	(708) 785-6969/Alexander VASQUEZ
37	VASQUEZ-PEREZ0452	(708) 785-6969/Alex VASQUEZ	8/5/2008	01:31:11pm	(773) 910-0452/Joel PEREZ
38	CS-CRUZ	(773) 386-6161/CS	8/5/2008	01:41:00pm	(773) 865-4913/Carlos CRUZ
39	CRUZ-PEREZ8098	(773) 310-8098/Joel PEREZ	8/5/2008	01:43:49pm	(773) 865-4913/Carlos CRUZ
40	VASQUEZ-PEREZ0452	(773) 910-0452/Joel PEREZ	8/5/2008	01:46:40pm	(708) 785-6969/Alexander VASQUEZ
41	VASQUEZ-PEREZ0452	(773) 910-0452/Joel PEREZ	8/5/2008	01:50:17pm	(708) 785-6969/Alexander VASQUEZ
42	CRUZ-PEREZ0452	(773) 910-0452/Joel PEREZ	8/5/2008	01:55:19pm	IN- (773) 865-4913/Carlos CRUZ
43	VASQUEZ-PEREZ0452	(708) 785-6969/Alex VASQUEZ	8/5/2008	01:57:54pm	(773) 910-0452/Joel PEREZ
44	VASQUEZ-PEREZ0452	(708) 785-6969/Alex VASQUEZ	8/5/2008	02:39:12pm	(773) 910-0452/Joel PEREZ
45	VASQUEZ-PEREZ0452	(708) 785-6969/Alex VASQUEZ	8/5/2008	03:10:55pm	IN- (773) 910-0452/Joel PEREZ
46	VASQUEZ-PEREZ0452	(708) 785-6969/Alex VASQUEZ	8/5/2008	03:15:59pm	(773) 910-0452/Joel PEREZ
47	VASQUEZ-PEREZ0452	(708) 785-6969/Alex VASQUEZ	8/5/2008	03:31:49pm	(773) 910-0452/Joel PEREZ
48	CRUZ-PEREZ0452	(773) 865-4913/Carlos CRUZ	8/5/2008	3:56:03pm	(773) 910-0452/Joel PEREZ
49	CS-CRUZ	(773) 386-6161/CS	8/5/2008	03:57:10pm	(773) 865-4913/Carlos CRUZ
50	CRUZ-PEREZ0452	(773) 910-0452/Joel PEREZ	8/5/2008	03:58:55pm	(773) 865-4913/Carlos CRUZ
51	VASQUEZ-PEREZ0452	(708) 785-6969/Alex VASQUEZ	8/5/2008	04:08:11pm	(773) 910-0452/Joel PEREZ
52	VASQUEZ-PEREZ0452	(773) 910-0452/Joel PEREZ	8/5/2008	04:10:02pm	(708) 785-6969/Alexander VASQUEZ

GOVERNMENT EXHIBIT

SUMMARY OF CALLS

CS-CRUZ	CRUZ -PEREZ	VASQUEZ-PEREZ	PEREZ0452-PEREZ8098

calls	Callers	Target Phone	Date	Adj Time	Number Dialed
53	CRUZ-PEREZ0452	(773) 910-0452/Joel PEREZ	8/5/2008	04:25:15pm	(773) 885-4913/Carlos CRUZ
54	CS-CRUZ	(773) 386-6161/CS	8/5/2008	04:36:00pm	(773) 885-4913/Carlos CRUZ
55	CRUZ-PEREZ0452	(773) 910-0452/Joel PEREZ	8/5/2008	04:44:34pm	(773) 885-4913/Carlos CRUZ
56	CRUZ-PEREZ0452	(773) 910-0452/Joel PEREZ	8/5/2008	04:50:31pm	(773) 885-4913/Carlos CRUZ
57	CRUZ-PEREZ0452	(773) 910-0452/Joel PEREZ	8/5/2008	05:03:35pm	(773) 885-4913/Carlos CRUZ
58	VASQUEZ-PEREZ0452	(708) 785-6969/Alex VASQUEZ	8/5/2008	05:05:21pm	(773) 910-0452/Joel PEREZ
59	CS-CRUZ	(773) 885-4913/Carlos CRUZ	8/5/2008	05:16:00pm	(773) 386-6161/CS
60	VASQUEZ-PEREZ0452	(708) 785-6969/Alex VASQUEZ	8/5/2008	05:22:46pm	(773) 910-0452/Joel PEREZ
61	CS-CRUZ	(773) 386-6161/CS	8/5/2008	05:24:00pm	(773) 885-4913/Carlos CRUZ
62	VASQUEZ-PEREZ0452	(708) 785-6969/Alex VASQUEZ	8/5/2008	05:24:42pm	(773) 910-0452/Joel PEREZ
63	CS-CRUZ	(773) 386-6161/CS	8/5/2008	05:25:00pm	(773) 885-4913/Carlos CRUZ
64	VASQUEZ-PEREZ0452	(708) 785-6969/Alex VASQUEZ	8/5/2008	05:29:01pm	(773) 910-0452/Joel PEREZ
65	CRUZ-PEREZ0452	(773) 910-0452/Joe PEREZ	8/5/2008	05:32:46pm	(773) 885-4913/Carlos CRUZ
66	CS-CRUZ	(773) 386-6161/CS	8/5/2008	05:34:00pm	(773) 885-4913/Carlos CRUZ
67	CS-CRUZ	(773) 386-6161/CS	8/5/2008	05:48:00pm	(773) 885-4913/Carlos CRUZ

#	Parties	Calling Phone	Date	Time	Number Dialed
	PEREZ-UNKNOWN	(773) 310-[illegible]	[illegible]/2008	4:35:54 PM	(630) 290-5285
	PEREZ-UNKNOWN	Unknown	[illegible]/2008	4:21:00 PM	(773) 910-0452
	PEREZ-UNKNOWN	(773) 310-[illegible]	[illegible]/2008	4:32:32 PM	(630) 290-5285
	PEREZ-UNKNOWN	(773) 310-[illegible]	[illegible]/2008	4:32:49 PM	(773) 282-1178
	PEREZ-UNKNOWN	(773) 910-0452	[illegible]/2008	4:33:00 PM	(773) 979-0802
	PEREZ-UNKNOWN	(773) 310-[illegible]	[illegible]/2008	4:33:44 PM	(847) 271-0155
	PEREZ-UNKNOWN	Unknown	[illegible]/2008	4:42:00 PM	(773) 910-0452
	PEREZ-UNKNOWN	Unknown	[illegible]/2008	4:43:00 PM	(773) 910-0452
	PEREZ-UNKNOWN	(773) 310-[illegible]	[illegible]/2008	4:45:04 PM	(630) 290-5285
	PEREZ-UNKNOWN	(773) 310-[illegible]	[illegible]/2008	4:56:22 PM	(773) 396-3638
	PEREZ-UNKNOWN	(773) 910-0452	[illegible]/2008	4:57:00 PM	(773) 979-0802
	PEREZ-UNKNOWN	Unknown	[illegible]/2008	4:58:00 PM	(773) 910-0452
	PEREZ-UNKNOWN	(773) 310-[illegible]	[illegible]/2008	5:00:13 PM	(773) 282-1178
	PEREZ-UNKNOWN	(773) 310-[illegible]	[illegible]/2008	5:05:54 PM	(847) 800-1798
	PEREZ-UNKNOWN	Unknown	[illegible]/2008	5:06:00 PM	(773) 910-0452
	PEREZ-UNKNOWN	(773) 310-[illegible]	[illegible]/2008	5:08:30 PM	(847) 671-5889
	PEREZ-UNKNOWN	(773) 310-[illegible]	[illegible]/2008	5:09:00 PM	(773) 396-3638
	PEREZ-UNKNOWN	(773) 310-[illegible]	[illegible]/2008	5:10:17 PM	(702) 979-8150
	PEREZ-UNKNOWN	(773) 310-[illegible]	[illegible]/2008	5:11:36 PM	(630) 514-3166
	PEREZ-UNKNOWN	(773) 910-0452	[illegible]/2008	5:12:00 PM	(773) 979-0802
	PEREZ-UNKNOWN	(773) 310-[illegible]	[illegible]/2008	5:13:56 PM	(773) 226-0403
	PEREZ-UNKNOWN	(773) 910-0452	[illegible]/2008	5:36:00 PM	(773) 979-0802
	PEREZ-UNKNOWN	(773) 310-[illegible]	[illegible]/2008	5:36:21 PM	(312) 933-6682
	PEREZ-UNKNOWN	(773) 310-[illegible]	[illegible]/2008	5:39:30 PM	(702) 979-8150
	PEREZ-UNKNOWN	(773) 910-0452	[illegible]/2008	5:40:00 PM	(773) 979-0802
2	VASQUEZ-PEREZ0452	(708)785-6969/VASQUEZ	[illegible]/2008	5:40:10 PM	(773)910-0452/PEREZ
	PEREZ-UNKNOWN	(773) 310-[illegible]	[illegible]/2008	5:41:02 PM	(847) 800-1798
	PEREZ-UNKNOWN	(773) 910-0452	[illegible]/2008	5:45:00 PM	(773) 979-0802
1	VASQUEZ-PEREZ0452	(708)785-6969/VASQUEZ	[illegible]/2008	5:48:59 PM	(773)910-0452/PEREZ
	PEREZ-UNKNOWN	(773) 310-[illegible]	[illegible]/2008	5:57:36 PM	(702) 979-8150
	PEREZ-UNKNOWN	(773) 310-[illegible]	[illegible]/2008	6:00:07 PM	(847) 800-1798
	PEREZ-UNKNOWN	(773) 310-[illegible]	[illegible]/2008	6:01:15 PM	(847) 800-1798
	PEREZ-UNKNOWN	(773) 910-0452	[illegible]/2008	6:02:00 PM	(773) 979-0802
	PEREZ-UNKNOWN	(773) 310-[illegible]	[illegible]/2008	6:10:57 PM	(773) 551-5546
	PEREZ-UNKNOWN	(773) 910-0452	[illegible]/2008	6:13:00 PM	(773) 979-0802
4	VASQUEZ-PEREZ0452	(708)785-6969/VASQUEZ	[illegible]/2008	6:14:11 PM	(773)910-0452/PEREZ
	PEREZ-UNKNOWN	(773) 310-[illegible]	[illegible]/2008	6:30:24 PM	(312) 933-6682
	PEREZ-UNKNOWN	(773) 310-[illegible]	[illegible]/2008	6:31:06 PM	(773) 979-0802
	PEREZ-UNKNOWN	(773) 310-[illegible]	[illegible]/2008	6:31:54 PM	(312) 933-6682
	PEREZ-UNKNOWN	(773) 979-0802	[illegible]/2008	6:35:31 PM	(773) 310-[illegible]
	PEREZ-UNKNOWN	(773) 310-[illegible]	[illegible]/2008	6:35:52 PM	(312) 933-6682
	PEREZ-UNKNOWN	(773) 979-0802	[illegible]/2008	6:48:52 PM	(773) 310-[illegible]
	PEREZ-UNKNOWN	(773) 310-[illegible]	[illegible]/2008	6:49:11 PM	(773) 551-5546
	PEREZ-UNKNOWN	(773) 910-0452	[illegible]/2008	6:51:00 PM	(773) 556-6203
	PEREZ-UNKNOWN	Unknown	[illegible]/2008	6:58:00 PM	(773) 910-0452
	PEREZ-UNKNOWN	Unknown	[illegible]/2008	7:02:00 PM	(773) 910-0452
	PEREZ-UNKNOWN	(773) 910-0452	[illegible]/2008	7:03:00 PM	(773) 979-0802

	PEREZ-UNKNOWN	Unknown	8/4/2008	7:11:00 PM	(773) 9100452
	PEREZ-UNKNOWN	Unknown	8/4/2008	7:26:00 PM	(773) 9100452
	PEREZ-UNKNOWN	(773) 310-8098	8/4/2008	7:27:33 PM	(773) 979-0802
	PEREZ-UNKNOWN	(773) 9100452	8/4/2008	7:28:00 PM	(773) 556-6203
	PEREZ-UNKNOWN	(773) 9100452	8/4/2008	7:29:00 PM	(773) 556-6203
5	CRUZ-PEREZ8098	(773)310-8098/PEREZ	8/4/2008	7:29:15 PM	(773)865-4913/CRUZ
6	CRUZ-PEREZ8098	(773)310-8098/PEREZ	8/4/2008	7:31:04 PM	(773)865-4913/CRUZ
	PEREZ-UNKNOWN	(773) 9100452	8/4/2008	7:36:00 PM	(773) 450-8155
	PEREZ-UNKNOWN	(773) 310-8098	8/4/2008	7:38:48 PM	(773) 392-4544
	PEREZ-UNKNOWN	(773) 9100452	8/4/2008	7:42:00 PM	(773) 620-2103
	PEREZ-UNKNOWN	(773) 310-8098	8/4/2008	7:42:10 PM	(773) 620-2103
	PEREZ-UNKNOWN	(773) 9100452	8/4/2008	7:43:00 PM	(773) 450-8155
7	PEREZ8098-PEREZ0452	(773)310-8098/PEREZ	8/4/2008	7:47:08 PM	(773)910-0452/PEREZ
	PEREZ-UNKNOWN	Unknown	8/4/2008	7:51:00 PM	(773) 9100452
	PEREZ-UNKNOWN	(773) 310-8098	8/4/2008	7:57:09 PM	(708) 846-6095
	PEREZ-UNKNOWN	(773) 9100452	8/4/2008	7:58:00 PM	(773) 979-0802
	PEREZ-UNKNOWN	(773) 310-8098	8/4/2008	8:00:01 PM	(708) 846-6095
	PEREZ-UNKNOWN	(773) 310-8098	8/4/2008	8:09:01 PM	(708) 846-6095
	PEREZ-UNKNOWN	(773) 9100452	8/4/2008	8:12:00 PM	(773) 979-0802
	PEREZ-UNKNOWN	Unknown	8/4/2008	8:16:00 PM	(773) 9100452
	PEREZ-UNKNOWN	(773) 756-7609	8/4/2008	8:20:07 PM	(773) 310-8098
	PEREZ-UNKNOWN	Unknown	8/4/2008	8:26:00 PM	(773) 9100452
	PEREZ-UNKNOWN	(773) 756-7609	8/4/2008	8:29:22 PM	(773) 310-8098
	PEREZ-UNKNOWN	(773) 9100452	8/4/2008	8:30:00 PM	(773) 979-0802
	PEREZ-UNKNOWN	(773) 9100452	8/4/2008	8:35:00 PM	(773) 899-1184
	PEREZ-UNKNOWN	Unknown	8/4/2008	8:39:00 PM	(773) 9100452
8	VASQUEZ-PEREZ0452	(708)785-6969/VASQUEZ	8/4/2008	8:49:58 PM	(773)910-0452/PEREZ
9	VASQUEZ-PEREZ0452	(708)785-6969/VASQUEZ	8/4/2008	8:52:15 PM	(773)910-0452/PEREZ
	PEREZ-UNKNOWN	(773) 9100452	8/4/2008	9:01:00 PM	(773) 899-1184
10	VASQUEZ-PEREZ0452	(773)910-0452/PEREZ	8/4/2008	9:03:22 PM	(708)785-6969/VASQUEZ
	PEREZ-UNKNOWN	(847) 845-7913	8/4/2008	9:04:54 PM	(773) 310-8098
	PEREZ-UNKNOWN	(773) 310-8098	8/4/2008	9:08:57 PM	(773) 226-0003
	PEREZ-UNKNOWN	(773) 9100452	8/4/2008	9:10:00 PM	(773) 226-0003
	PEREZ-UNKNOWN	(773) 310-8098	8/4/2008	9:17:05 PM	(773) 226-0003
	PEREZ-UNKNOWN	(847) 845-7913	8/4/2008	9:20:05 PM	(773) 310-8098
	PEREZ-UNKNOWN	(773) 310-8098	8/4/2008	9:20:27 PM	(773) 226-0003
	PEREZ-UNKNOWN	(773) 9100452	8/4/2008	9:21:00 PM	(773) 979-0802
	PEREZ-UNKNOWN	(773) 310-8098	8/4/2008	9:21:13 PM	(773) 226-0003
	PEREZ-UNKNOWN	Unknown	8/4/2008	9:29:00 PM	(773) 9100452
	PEREZ-UNKNOWN	(847) 845-7913	8/4/2008	9:30:00 PM	(773) 310-8098
	PEREZ-UNKNOWN	(773) 9100452	8/4/2008	9:31:00 PM	(773) 979-0802
	PEREZ-UNKNOWN	(773) 310-8098	8/4/2008	9:31:17 PM	(847) 845-7913
	PEREZ-UNKNOWN	Unknown	8/4/2008	9:33:00 PM	(773) 9100452
	PEREZ-UNKNOWN	(773) 9100452	8/4/2008	9:42:00 PM	(773) 1006185
	PEREZ-UNKNOWN	(773) 9100452	8/4/2008	9:43:00 PM	(773) 899-1184
	PEREZ-UNKNOWN	(773) 310-8098	8/4/2008	9:51:32 PM	(773) 885-3117
11	VASQUEZ-PEREZ0452	(708)785-6969/VASQUEZ	8/4/2008	9:51:46 PM	(773)910-0452/PEREZ
	PEREZ-UNKNOWN	Unknown	8/4/2008	9:57:00 PM	(773) 9100452
12	VASQUEZ-PEREZ0452	(773)910-0452/PEREZ	8/4/2008	10:04:53 PM	(708)785-6969/VASQUEZ

13	VASQUEZ-PEREZ0452	(773)910-0452/PEREZ,	8/4/2008	10:08:49 PM	(708)785-6969/VASQUEZ,
	PEREZ-UNKNOWN	(773) 9100452	8/4/2008	10:09:00 PM	(773) 979-0802
14	VASQUEZ-PEREZ0452	(708)785-6969/VASQUEZ, 76	8/4/2008	10:10:38 PM	(773)910-0452/PEREZ,
	PEREZ-UNKNOWN	(773) 9100452	8/4/2008	10:11:00 PM	(773) 979-0802
	PEREZ-UNKNOWN	(773) 310 8098	8/4/2008	10:11:27 PM	(773) 885-3117
	PEREZ-UNKNOWN	(773) 310 8098	8/4/2008	10:16:18 PM	(773) 885-3117
	PEREZ-UNKNOWN	(773) 310 8098	8/4/2008	10:22:49 PM	(773) 392-1544
	PEREZ-UNKNOWN	(773) 310 8098	8/4/2008	10:41:33 PM	(773) 979-0802
	PEREZ-UNKNOWN	(773) 310 8098	8/4/2008	10:46:47 PM	(773) 580-0897
	PEREZ-UNKNOWN	Unknown	8/4/2008	10:49:00 PM	(773) 9100452
	PEREZ-UNKNOWN	(773) 9100452	8/4/2008	10:50:00 PM	(773) 580-0897
	PEREZ-UNKNOWN	Unknown	8/4/2008	10:57:00 PM	(773) 9100452
	PEREZ-UNKNOWN	(708) 845-1986	8/4/2008	11:00:38 PM	(773) 310 8098
	PEREZ-UNKNOWN	(708) 845-1986	8/4/2008	11:02:16 PM	(773) 310-8098
15	VASQUEZ-PEREZ0452	(773)910-0452/PEREZ,	8/4/2008	11:03:24 PM	(708)785-6969/VASQUEZ,
	PEREZ-UNKNOWN	(773) 310 8098	8/4/2008	11:33:47 PM	(773) 331-8052
	PEREZ-UNKNOWN	(773) 310-8098	8/5/2008	1:13:40 AM	(708) 243-8006
	PEREZ-UNKNOWN	(773) 310 8098	8/5/2008	1:57:45 AM	(773) 458-0628
	PEREZ-UNKNOWN	(773) 310-8098	8/5/2008	7:28:45 AM	(773) 419-4411
	PEREZ-UNKNOWN	(708) 845-1986	8/5/2008	8:37:54 AM	(773) 310-8098
16	VASQUEZ-PEREZ0452	(708)785-6969/VASQUEZ,	8/5/2008	8:54:52 AM	(773)910-0452/PEREZ,
17	VASQUEZ-PEREZ0452	(708)785-6969/VASQUEZ,	8/5/2008	9:36:25 AM	(773)910-0452/PEREZ,
	PEREZ-UNKNOWN	(773) 310-8098	8/5/2008	9:45:02 AM	(708) 527-1522
18	VASQUEZ-PEREZ0452	(773)910-0452/PEREZ,	8/5/2008	9:46:56 AM	(708)785-6969/VASQUEZ,
	PEREZ-UNKNOWN	(773) 9100452	8/5/2008	10:12:00 AM	(708) 527-1522
19	VASQUEZ-PEREZ0452	(773)910-0452/PEREZ,	8/5/2008	10:12:56 AM	(708)785-6969/VASQUEZ,
	PEREZ-UNKNOWN	(773) 9100452	8/5/2008	10:13:00 AM	(708) 527-1522
[redacted]					
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	PEREZ-UNKNOWN	(773) 310-8098	8/5/2008	10:44:38 AM	(773) 396-3638
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	PEREZ-UNKNOWN	(773) 310 8098	8/5/2008	11:07:41 AM	(773) 396-3638
	PEREZ-UNKNOWN	(773) 310 8098	8/5/2008	11:10:39 AM	(773) 396-3638
21	VASQUEZ-PEREZ0452	(708)785-6969/VASQUEZ,	8/5/2008	11:15:17 AM	(773)910-0452/PEREZ,
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22	CRUZ-PEREZ8098	(773)310-8098/PEREZ,	8/5/2008	11:33:15 AM	(773)865-4913/CRUZ,
23	CRUZ-PEREZ0452	(773)910-0452/PEREZ,	8/5/2008	11:35:19 AM	(773)865-4913/CRUZ,
24	CRUZ-PEREZ8098	(773)310-8098/PEREZ,	8/5/2008	11:38:58 AM	(773)865-4913/CRUZ,
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34	VASQUEZ-PEREZ0452	(708)785-6969/VASQUEZ	8/5/2008	12:54:34 PM	(773)910-0452/PEREZ
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38	CRUZ-PEREZ0452	(773)936-6161/CRUZ	8/5/2008	1:41:00 PM	(773)865-9913/CRUZ
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38	CRUZ-PEREZ0452	(773)865-4913/CRUZ	8/5/2008	3:36:00 PM	(773)910-0452/PEREZ
39	CS-CRUZ	(773)386-6161/CS	8/5/2008	3:37:00 PM	(773)865-4913/CRUZ
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43	CRUZ-PEREZ0452	(773)910-0452/PEREZ	8/5/2008	3:28:15 PM	(773)865-4913/CRUZ
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51	CS-CRUZ	(773)386-6161/CS	8/5/2008	5:24:00 PM	(773)865-4913/CRUZ
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65	CRUZ-PEREZ0452	(773)910-0452/PEREZ	8/5/2008	5:32:46 PM	(773)865-4913/CRUZ
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Date of call: August 1st 2009 at 11:02 a.m.

Phone # contacted: 773-589-9897

Inmate #: 4059424

Transcribed by: TFO Rodolfo Avalos

This is a summary of the conversation and may not be word for word.

Phone rings...

MARINA: Hello?

Automated message informing that there is a call from inmate from a federal prison.

MARINA: Hello...

PEREZ: Hey I'm sorry did I wake you up?
Sleeping huh?

MARINA: I'm okay.

PEREZ: You where sleeping?

MARINA: Yeah.

PEREZ: Sorry.

MARINA: That's alright hun I had to wake up anyways.

PEREZ: Yeah.
Sighs.
What are you doing? Today.
You guys doing anything?

MARINA: Hmmm...
I don't know.
Hopefully not.
My dad wants to hang out with me and the baby.

PEREZ: Yeah.

MARINA: My dad is the only one that's like oh if he goes then…
When I get my settlement I wanna buy a building and I want you to live in the building.

PEREZ: Yeah.

MARINA: Because you can't be living by yourself.
I told him I don't wanna be with another man.
I don't wanna be with nobody.

PEREZ: Yeah.

MARINA: I'm used to being by myself already.
I just don't wanna live alone, alone.
I would rather stay…

PEREZ: Hey but why are you talking like this?
What did he say?
I'm fucked or something for some reason?

MARINA: No.

PEREZ: What are you talking?
You got me all freaking out.
I can't.

MARINA: Freaking out?

PEREZ: What's the problem?
What are you saying?

MARINA: You want me too…
I tell you exactly…

PEREZ: No, no, not exactly.

MARINA: Why not?

PEREZ: Just no.
Just explain to me.

MARINA: But Beau is trying to tell me is that you're fucked.
That's what… **(U/I)**

PEREZ: Alright.

MARINA: Beau is trying to make you look like you're fucked so he can use this strategy.

PEREZ: Alright, alright…

MARINA: And then Lapuma.
I called Lapuma.
Lapuma got pissed and started cursing him…
Started cursing.
"That mother fucker!"
I never heard him like that.
"Who the hell does he think he is?"
"You know?"
"He's a weasel."
He's just trying…you know."

PEREZ: Yeah, yeah…
Yeah but he's gonna talk to them.
They are gonna talk. Alright?

MARINA: Yeah they are gonna talk.

PEREZ: Okay, so this just mean that.
That's what's gonna happen.
Like…U/I…its not.
You know?

MARINA: But listen to what Beau saying.

PEREZ: Wait, we can't…
U/I

MARINA: I don't give a shit.
I'm gonna tell you.

PEREZ: No, no, no.
I don't care.
Hang up.
Don't worry.
I don't want you to worry about it.
It's gonna get resolved.
They gotta sit down and they gotta talk.
And they just gotta put something together.

That's it.
Don't worry about it.

MARINA: Yup.
And when I called Puma he was about to go into a baseball.
I kept calling him and calling him.

PEREZ: Yeah.

MARINA: You know?
I kept calling him and he answered and he's like "is everything okay?"
I was like no everything is not okay.
I just finished meeting with this fagot.

PEREZ: Yeah.

MARINA: And this is what he told me.
He's like "are you serious?"
He got pissed.

PEREZ: But did he tell me...
Did, did...you tell him.
You need to tell him, you need to talk to this guy.

MARINA: Yeah.
He was like "yeah well..."

PEREZ: And Marilyn told him that too?
She told Beau hey...

MARINA: Marilyn was quite.

PEREZ: She didn't tell him, hey you need to sit down with Beau and Lapuma talk?

MARINA: Yeah.
Oh yeah she told him.

PEREZ: Okay

MARINA: She told him "you need to talk to Alex and you need to talk to Frank."
"You guys need to come to an agreement."

PEREZ: Right.
That's...
And what he said.

MARINA: She's like "I'm gonna do whatever Alex asks me to do.

PEREZ: Right, right.
Don't worry about it.

MARINA: That guys looks like a weirdo sas lawyer.

PEREZ: Alright.

MARINA: A young fucking idiot.

PEREZ: Don't' worry about it babe I don't want you to be upset.
Was Kyle there or no?

Casual Conversation.

PEREZ: I just can't explain to you.
You know what I mean?

MARINA: What?

PEREZ: I just can't explain to you how…
What did say…you ask him…
I don't know.
How did you guys talk to this guy?
You know what I mean.

MARINA: What do you mean I started snapping. Kind of, you know?
I was like, basically what you are telling me…
Is…
Throw Joel down.
And…
That's what you're saying to me?

PEREZ: Right, right.

MARINA: **That, that.**
I told him that's what you are saying to me.
You're telling me…
To, it's better to save this guy and…
Throw him down.

PEREZ: Right.

MARINA: That's what you're saying to me?

That, that's not gonna happen.

PEREZ: Yeah.
What did he say when you told him that?

MARINA: He's like well I'm gonna do whatever Alex tells me to do.

PEREZ: U/I

MARINA: And I said well I'm gonna call Frank.
And...Yeah.

PEREZ: Alright.

MARINA: And I looked at him crazy.
He didn't even wanna look at me when he was talking.
I was looking at him like I wanted to smack the shit out of him.

PEREZ: Yeah.

MARINA: He don't even make sense.
He's from Texas and sounds like a George W. Bush.

PEREZ: Right.

MARINA: You know?
He's a freaking moron that guy.
That guys is a fucking idiot.

PEREZ: Alright.

MARINA: That guy charges.
Whatever he charges and he fucking works with two young dumb fucks.

PEREZ: Right, right.

MARINA: In a small office and him by himself.
It's him by himself.

PEREZ: Right.

MARINA: And he just takes all these cases cause he is greedy and treats all his clients like shit.

Casual conversation.

PEREZ: Don't' worry about it.
The lawyer Lapuma said don't worry.
What did he say don't worry it's not gonna happen?
What did he say?

MARINA: He said don't worry.
Because he is just trying to make it seem like…
You know…
That guy was such a jerk that he was trying to make it seem that you're fucked period.
That's what Beau was saying.
That you are fucked anyway so why what difference does it make.

PEREZ: Alright, alright.

MARINA: Like a jerk.

PEREZ: Yeah.
All I know I'm fucked.
I didn't do nothing.
I didn't…

MARINA: You didn't do nothing.

PEREZ: I didn't do it.

MARINA: The jury is not gonna sit there and be like. Yeah just because you left your house and went to Arlington Heights does not mean shit.

PEREZ: Right.

MARINA: That's what he is trying to say.
Just because you left there you are fucked.

PEREZ: Right.

MARINA: Well if that's the case then that's Alex's problem too.
What are you trying to…
He's trying to think that people are dumb.
That's what he tried to tell me.

PEREZ: Yeah.

MARINA: He tried to tell me what difference does it make.
This guys is fucked because he left…his house and came here.

PEREZ: Nah.

MARINA: Okay?
If we talk about this car.
Well then you know…Alex would be okay.
I'm like what?
Alex came too!
If Joel is so much fucked then so is he.
You fucking dumbass!
That guys is a fucking…
Do you hear what I'm saying?

PEREZ: Right.

MARINA: Does that sound stupid or what?
That don't sound stupid?

PEREZ: Right right right.
Don't worry about it.

MARINA: You need to tell him.

PEREZ: Don't worry about it.

MARINA: And later he told me that it was his idea.

PEREZ: Right.

MARINA: I'm like wow I don't know.
And then you know.
Alex U/I
What did he discuss.

PEREZ: Right.

MARINA: U/I
He's like this is what we discussed and he said it.
I'm like get the fuck out of here.

PEREZ: Yeah.
Don't worry about it. Its not gonna be that way.

MARINA: I know we will be fine.
He was just saying that just to be jerk.

PEREZ: That's not what he told this guy when he... U/I
This guy is lying to me but...
You know what I mean?

MARINA: No...
This guy is lying to me so we can be like yeah Alex let this jackass...

PEREZ: Right right right.

MARINA: Do whatever he wants.
You know and I'm not gonna do that.
I told him that is fucking fucked up.

Casual conversation.

End of call.

Date of call: August 5, 2009 at 11:20:48 a.m.

Inmate #: 4059424

[PERSONAL CONVERSATION NOT TRANSCRIBED HERE]

Marina Perez: Did you call Lipuma?

Joel Perez: Yeah, I talked to him.

Marina Perez: What did he say?

Joel Perez: He's pissed off. That's all. He'll be here to see me tomorrow or Friday. I don't know, i got to talk with you, if that's the way things are, I'm not going to go to trial, I'm not going to go, fuck that.

Marina Perez: Who says that's the way things are?

Joel Perez: No, I'm just saying. If that's the way it's going to be, with two lawyers who aren't going to get along, I'm just not going to go, to trial like that, I'm not going to go to trial like that. So, I'll explain to you.

Marina Perez: Well, you have to go.

Joel Perez: No, I don't have to do anything Marina. You don't understand. You don't understand. You don't understand, man. You think it is just that easy.

Marina Perez: If you plead, you can't appeal. So go ahead and do whatever the fuck you want to do.

Joel PEREZ: Yeah.

Marina PEREZ Go ahead and sit there for 14 years. That's what they're going to offer you.

Joel Perez: That's not what I'm talking about. There's different ways to go by it.

Marina Perez: What other ways are there?

Joel PEREZ: There's different ways.

Marina PEREZ: Like what?

Joel Perez: I'll explain it to you. There's a way where they leave it to the judge. And it's not up to anybody else. It's just up to the judge.

Marina Perez: So what did he say?

Joel Perez: He didn't say anything. He's just asking me, are you still going to go to trial. U/I we are still going to go, this and that. He said, "oh, I can't believe that lawyer, why would he tell your wife that? He's so unprofessional. You know what I mean? I didn't know he was going to be this way."

Marina Perez: That's what he said, unprofessional? He didn't say he's not true? Or what…

Joel Perez: He hasn't even talked to the lawyer yet. He hasn't even talked to Beau. What a fucked up situation, man. I just can't wait to see you and explain to you. So tomorrow, please be here early, early, as earliest as you can, be here at 11:15, 11:30, so I can see you at 12, so I can see you and explain to you for a couple two, three hours and explain what I'm saying. Please. Fuck that. I don't want to get out of here when my kid is 23 years old. U/I shit. I want to get out of here when's fucking 9 or 8 or 10, instead of fucking 23 years old. I don't know.

Marina Perez: Well he told me some stupid shit that it's not going to be like that.

Joel Perez: He said I didn't even approve of her going there, I don't know where she went. But then, you got to understand, he came to see "Big" Monday last week, and he was explaining to him the situation I'm in and the situation he's in. He was explaining to him, and he was just explaining to him. And he told him, that's why I can't explain to you. When I see you I can explain to you better, I can't explain it to you right now, so don't worry about it.

Marina Perez: You're telling me don't worry?

Joel Perez: No, I don't want you to worry. You've been upset for fucking all these days.

Marina Perez: How can I not worry? What are you talking about? What do you mean it's not that way? What are you talking about?

Joel Perez: I don't understand babe what's going on, but it's not the way, Beau's, he's putting it two different ways. If he didn't explain to you the way, the either or, then it's a different story. If you didn't ask him, then ..

Marina Perez: Yes, he's saying that everybody is going to lose. He's saying whatever he wants to say. I don't believe him

Joel Perez: I don't know what's going to happen. I just can't wait to see you tomorrow

Marina Perez: Well, what he's saying is stupid, that does not make sense.

Joel Perez: Okay, you don't understand me

Marina Perez: Just because you're there, then that means everybody is in the shithole. He's trying to be, he's trying to fast talk me ...

Joel Perez: I didn't do nothing ...

Marina Perez: Trying to make me say, well, fine, argue whatever you want to argue. I'm going to tell Alex to let you argue whatever you want to argue.

Joel Perez: Baby, I love you, I just called to tell you that I talked to him, don't stressed. But if you call him or if he calls you ...

Marina Perez: Get a cop, tell him to come over, (U/I), talk on the phone with your dad.

Joel Perez: If he calls you, tell him, "make sure you go see my husband. He needs to see tomorrow or Friday. No later than Friday. He needs to see you".

Marina Perez: Oh, he didn't say it's unprofessional, he didn't say it was not true, or what?

Joel Perez: He didn't say it was not true. He was just upset. He didn't think things were going to turn out to be this way with Beau. You know what I mean? He hasn't talked with him, but he said it clearly, in other words, he saying it clearly, he basically said that Beau is basically trying to be a jackass, you know, the same things you're saying. Then, this guy, he put his phone on the list, so he's trying to call him, but the phone's not on the list yet.

Marina Perez: That nigger is not going to answer the phone. That guys a fucking retard, fucking Texas dweeb, who has a fucking little ass office. Why the fuck he charge so much?

[PERSONAL CONVERSATION NOT TRANSCRIBED HERE]

Joel Perez: If you talk to him, let him know I have to see him here. Tomorrow, please be early.

Date of Call: August 12, 2009 at 2:02 pm

[PERSONAL CONVERSATION NOT TRANSCRIBED HERE]

Marina Perez: I talked to Frank. He told me, he's trying to make it like where it's hard for me to see the interpreter. He was like the only time he gave me was 7:00 in the morning on Friday. I was like, well we'll go at 7:00 in the morning on Friday.

Joel Perez: Well, what he say?

Marina Perez: He was like, oh well I'll contact them to see if any better dates. Like, Like, he doesn't want me to hear that.

Joel Perez: The lawyers are full of shit, oh my God, man, a headache. Beau came to see Alex today, told him something else about, I don't know, I'll have to explain it to you. How about court? Should I go tomorrow? You going to come over here, or you don't want to come.

Marina Perez: Yeah, I'm going. U/I but he told me you don't need to go.

Joel Perez; Okay, then I'm not going to go. If you'd rather come talk to me.

Joel Perez: But Beau came, told him, he don't have to go. If you think I should go, then I go

Marina Perez: Somebody should be there, see what they say.

Joel Perez: well, he's not going to go. So, I don't know.

Marina Perez: So what'd Beau tell him? What did Beau tell him?

Joel Perez: A blind plea would be good, then he can guarantee this and that. You know what I mean? Just certain things, you know? I got to explain to you

Marina Perez: He's telling him about a blind plea also?

Joel Perez: Yeah, he is. I gotta explain to you. You know what I mean. He says, if you want, have his wife talk to me, this or that. I have to explain to you tomorrow.

Marina Perez: Anything else you can tell me about that meeting?

Joel Perez: That what?

Marina Perez: Is there anything else you can tell me about that?

Joel Perez: What do you mean? About what?

Marina Perez: About what else he said. Beau.

Joel Perez: Oh. (Whispers) I'll explain it to you tomorrow.

Marina Perez: So Beau is talking about less, lesser years, right?

Joel Perez: Yeah. Yeah. Yeah.

Marina Perez: But he's saying not to go to trial?

Joel Perez: He's saying we got to get rid of Lipuma. [Laughs] Oh my god, got to get rid of him and then he'll get another lawyer he's got, and I don't know. Shit like that.

Marina Perez: Wow.

Joel Perez: What are you watching? What are you doing?

Marina Perez: Washing dishes. The baby is watching t.v. So that's what he's saying? He can't work with Lipuma. We can't get rid of Lipuma.

Joel Perez: Okay, well. He's been waiting for Lipuma to call him, and to get a hold of him, and Lipuma hasn't done it. He hasn't done it. He's been waiting and waiting.

Marina Perez: Why hasn't he called him himself?

Joel Perez: I don't know.

Marina Perez: Because there have been times where he's called him and the dude doesn't call him back

Joel Perez: That's what I tell you. You have to tell Lipuma to get a hold of this guy.

Marina Perez: So what is he saying? Not to go to trial?

Joel Perez: No, he's not saying that, he's just saying that this is what'll be better for me, probably, but I have to explain it to you

Marina Perez: Well, explain it. Fuck it. What else can they do for us? We're already in the most fucked up situation in the world?

Joel Perez: Honey, why waste the minutes talking about this when I'll see you in a couple hours

Marina Perez: Because it's the most important shit that's on my mind. You don't understand you're on my mind all day. [Spanish]

Joel Perez: Listen, you have to understand this, I don't want to waste these little minutes on talking about this when we can speak about this tomorrow. I'm telling you, if you're worried about the kid, like I'm worried about it. Like everybody else, you should find out what Beau's got to say. Because maybe it's good what he's got to say. I can't explain to you. You have to go to his office.

Marina Perez: If Beau's way is the better way, then this is what we do. We tell Puma to do whatever Beau says and not to get another lawyer, because you know what, [Spanish]

Joel Perez: I'm telling you that I asked Lipuma yesterday something about relevant conduct. He says no, Beau saying yeah. You have to speak with Beau.

Marina Perez: Lipuma told me about that. And he told me, "listen I've worked in the prosecutor's office, that's not going to hold water". Beau's only been a lawyer for five years.

Joel Perez: He's fought this before. He guarantees it, babe. He guarantees it. He's fought this before and he has won. He is saying that he has won. That's what you don't understand about this lawyer. You don't know. He's got background that he is good. Look him up on the internet…look him up. Lawyers.com…and see how many cases he has won. Just look him up. Beau Brindley. I'm telling you what I'm hearing in the building, what everybody hears.

Marina Perez: Well, when he got this guy, why didn't you go with somebody with Beau.

Joel Perez: They told me he was good. Yesterday he gave me attitude. He don't like my attitude, but I have to tell him, listen, I'm desperate. I got a family. The weird vibe he gave me yesterday, you don't understand, I'm in a bad situation.

Marina Perez: Well we'll see. Whatever. What did Beau say? What? We have to go see Beau now?

Joel Perez: No, you would have to go see him and see what he says. Him to explain what relevant conduct is. Go with Kyle. Maybe you'll understand it. You guys are smart. Marilyn, don't take her. She is dumb. She is dumb. She don't know what the fuck they're talking about. See what he says. I have to explain tomorrow what is it that he is trying to say. How does it work. Relevant conduct. How does he fight things like that in court.

Marina Perez: Well, I already know what the answer is to our issue. I will go see Beau after I hear. After I hear those tapes. Then I will consider Beau. He was trying to make it difficult because I don't go there in the mornings. If that's the only time he's got, that's the time I'll see him.

Joel Perez: And he said what? Friday?

Marina Perez: Friday between 7 to 9. It will take two hours.

Joel Perez: I just don't want to be in the situation where my son gets fucked and I get fucked.

Marina Perez: Number one is my son.

Joel Perez: I feel like something is going to happen to me in here because of my kid. You don't understand man. I love my kid to death…I wanted to be with my kid. If some…the way Beau's saying, I have a chance to get out…real soon…and still get to be with my kid while my kid is still little. Still little. You know?

Marina Perez: Uh huh.

Joel Perez: You have to see what Beau has to say, just listen to him and he'll explain to you. He said, ask his wife to come to my office and I'll explain it to her.

Marina Perez: Tell me?

Joel Perez: Yes. Who else is going to go? Marilyn? No, you. Yes, you. Who else is going to go? My mom? My dad? They're not here.

Marina Perez: So, he wants to talk…he's going to talk about you?

Joel Perez: Yes. About me. Nothing else, just about me. He will explain to you how he will fight certain issues if I was to do it that way. Maybe call him babe. Call him and see what he's got to say. You want me to give you his number? Why don't you do this sweetheart? Why don't you do this?

Marina Perez: I'm going to have Marilyn call him.

Joel Perez: Not Marilyn. Fuck Marilyn. None of her business, this what has to do with me. Forget about having her call him. You have to call him and he has to explain to you what he's talking about. Not Marilyn. You know. You hear me?

Marina Perez: Uh huh.

Joel Perez: You call him, and I'll call you at 5 o'clock, and you tell me what he said. And

that's it. It's simple. Call him. Call him. Call him and see what he's got to say about Lipuma. Hey, why you haven't…you gotta do it babe. You gotta do it.

Marina Perez: Alright.

Joel Perez: Alright, so just tell her to give you the number. Call him and you ask him the questions, and then you already know and tomorrow we got something to talk about. This issue. Also, it'll explain to you how it works. It doesn't mean we're going to do it, but how it work, and what are his guarantees of it happening. And then you decide. And I'm not asking for you to decide…

Marina Perez: …how much time

Joel Perez: He's saying less than four, three and a half, four at the most. [Spanish] You gotta get on it now. You have to let me go, give him his number, see what he says. See what he's talking about.

Marina Perez: Yeah.

Joel Perez: I'm going to let you go, so just do that…call him until you get him…Lipuma, he got a fucking attitude.

Marina Perez: He got an attitude. He really had an attitude with you? He really had an attitude with you.

Joel Perez: Can you call Beau please? I'll let you go. Fuck this shit. My pulse, my heart pulse is high…Do me a favor. Call this lawyer. Tell me what he says…and we'll take it from there

Marina Perez: You don't want to wait to hear what I hear tomorrow.

Joel Perez: We got to see what Beau's saying and take it from there…

[PERSONAL CONVERSATION NOT TRANSCRIBED HERE]

Marina Perez: I don't care if it's three years, four.

[PERSONAL CONVERSATION NOT TRANSCRIBED HERE]

Joel Perez: Baby, just call him, see what he says. Don't worry. We'll get through it…

Preliminary Draft Transcript for Pretrial Use Only
Subject to Substantive Changes and Corrected
Voice Identification Upon Review of Tapes

Date: August 13, 2009 *Preliminary Transcript*
Time: 5:11:26 p.m.
Inmate Number 40549424 (Joel PEREZ)

[Call initiates]

MARINA PEREZ: Hello

MARINA PEREZ: Hello

JOEL PEREZ: Sunshine? What's happening?

MARINA PEREZ: Did I what?

JOEL PEREZ: Nothing. Nothing. How you doing? What happened?

MARINA PEREZ: Nothing. I talked to Beau. Beau's talking about a grant, uh, nah, if they grant uh…

JOEL PEREZ: Come on babe, let's not waste these minutes. Yeah.

MARINA PEREZ: If they grant us, uh, what is it called? U/I

JOEL PEREZ: Yeah.

MARINA PEREZ: It's like six to five. Maybe less.

JOEL PEREZ: Yeah, so, what, what, what we going to do?

MARINA PEREZ: Beau said that he would argue it for Puma.

JOEL PEREZ: Oh, he we do it for him?

MARINA PEREZ: He said if Puma didn't want to do it. Because Puma was doubting that it would be granted.

JOEL PEREZ: Right. Right, Right. So he would argue it for us, right?

MARINA PEREZ: Yeah

JOEL PEREZ: So, we don't need another attorney?

MARINA PEREZ: I don't think so. He didn't say anything to us about another attorney.

Preliminary Draft Transcript for Pretrial Use Only
Subject to Substantive Changes and Corrected
Voice Identification Upon Review of Tapes

JOEL PEREZ: Alright, okay. So what's the chances? What's uh..

MARINA PEREZ: What's the chances?

JOEL PEREZ: Yeah.

MARINA PEREZ: I asked him the probability and he wouldn't give it to me, but that it's a very strong argument and he's won it a couple times already.

JOEL PEREZ: Okay. So, what if they don't give it. What's the worse? What if?

MARINA PEREZ: What if they don't give it?

JOEL PEREZ: Yeah.

MARINA PEREZ: It's like ten (10), fifteen (15)

JOEL PEREZ: So, that's under a blind plea or a plea?

MARINA PEREZ: That has to be a specific plea, but you have to be careful before you sign anything because they'll try to be like, 'it was Alex too' or…I don't know whatever the fuck else he said

JOEL PEREZ: alright

MARINA PEREZ: Something about you have to be careful with the written agreement, or whatever it is

JOEL PEREZ: Alright. I don't understand. I thought it was a blind plea man.

MARINA PEREZ: No, you could enter a guilty or blind plea and still argue, the uh…

JOEL PEREZ: Right.

MARINA PEREZ: whatchama call it?

JOEL PEREZ: Right. Okay, but what does he think about, for the circumstances of the case? Would it be ten? What did he say?

MARINA PEREZ: He said, it could go down. If they do that thing. But if not, you're like at the fifteen (15) years. What do you mean?

JOEL PEREZ: So, it's at fifteen (15) years no matter what?

MARINA PEREZ: Yeah, it would be down to fifteen (15) years without the relevant…

Preliminary Draft Transcript for Pretrial Use Only
Subject to Substantive Changes and Corrected
Voice Identification Upon Review of Tapes

JOEL PEREZ: Yeah

MARINA PEREZ: …thing. Which could be argued down to ten (10)

JOEL PEREZ: Right

MARINA PEREZ: You know?

JOEL PEREZ: Right

MARINA PEREZ: And then, well yeah.

JOEL PEREZ: Alright then

MARINA PEREZ: Then, he has to argue the relevant thing. It is a strong argument. He explained it to me.

JOEL PEREZ: Right. Okay. Alright then. I'll call you back a little later.

[THEY SAY GOODBYE AND THEN HANG UP]

AO 245B (Rev. 6/05) Judgment in a Criminal Case
Sheet 1

779

UNITED STATES DISTRICT COURT

Northern District of Illinois

UNITED STATES OF AMERICA
v.
ALEXANDER VASQUEZ, JR.

JUDGMENT IN A CRIMINAL CASE

Case Number: 08 CR 625-3

USM Number: 40540-424

Ronu B. Bindley
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)

☐ pleaded nolo contendere to count(s) which was accepted by the court

☑ was found guilty on count(s) One after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. 846	conspiracy to Possess with Intent to Distribute Cocaine	[illegible]	One

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☑ The defendant has been found not guilty on count(s) Two

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

12/4/2009
Date of Imposition of Judgment

Signature of Judge

CHARLES R. NORGLE
Name of Judge

Title of Judge

12/4/2009
Date

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DEFENDANT: ALEXANDER VASQUEZ, JR.
CASE NUMBER: 08 CR 825-3

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

Twenty (20) years.

☑ The court makes the following recommendations to the Bureau of Prisons:

Designation to a facility in which the defendant can participate in the Residential Drug Treatment.
Designation to a facility located near the defendant's family.

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: ALEXANDER VASQUEZ, JR. 781 Judgment—Page 3 of 7
CASE NUMBER: 08 CR 625-3

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

eight (8) years.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*

☑ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*

☑ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*

☐ The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: ALEXANDER VASQUEZ, JR.
CASE NUMBER: 08 CR 825-3

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SPECIAL CONDITIONS OF SUPERVISION

Periodic drug tests shall not exceed 104 tests per year.

The defendant shall participate in a drug treatment program, which may include residential treatment and urine testing at the direction of the probation officer.

If the defendant is unemployed after the first 60 days of supervision, or if unemployed for 60 days after termination or lay-off from employment, the defendant shall perform at least 20 hours of community service work per week at the direction of and in the discretion of the probation office until gainfully employed.

The defendant shall provide the probation officer with access to any requested financial information.

DEFENDANT: ALEXANDER VASQUEZ, JR.
CASE NUMBER: 08 CR 625-3

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Judgment — Page 5 of 7

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 100.00	$ 0.00	$ 0.00

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
[redacted]			

TOTALS	$ 0.00	$ 0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 1

784

UNITED STATES DISTRICT COURT

Northern District of Illinois

UNITED STATES OF AMERICA
v.
ALEXANDER VASQUEZ, JR.

JUDGMENT IN A CRIMINAL CASE

Case Number: 08 CR 625-3

USM Number: 40548-424

Beau B. Brindley
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

☑ was found guilty on count(s) One
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. §846	Conspiracy to Distribute Cocaine	[redacted]	One

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☑ The defendant has been found not guilty on count(s) Two

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

12/4/2009
Date of Imposition of Judgment

Signature of Judge

CHARLES R. NORGLE
Name of Judge

Title of Judge

12/4/2009
Date

ADDITIONAL FORFEITED PROPERTY

*See attached Preliminary Order of Forfeiture.

PETITIONER'S BRIEF

NO. 11-199

IN THE SUPREME COURT
OF THE UNITED STATES

ALEXANDER VASQUEZ,

Petitioner,

- v -

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Seventh Circuit

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Seventh Circuit violate this Court's harmless-error precedent when it focused its harmless-error analysis solely on the weight of the untainted evidence without considering the potential effect of the error (the erroneous admission, for the truth of the matter asserted, of trial counsel's statements that his client would lose the case and should plead guilty) at all?

2. Did the Seventh Circuit violate Mr. Vasquez's Sixth Amendment right to a jury trial when it determined that Mr. Vasquez should have been convicted instead of considering the effect of the district court's error on the jury's verdict?

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OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 635 F.3d 889 and reprinted at Pet. App. 2A-29A.

JURISDICTION

The court of appeals entered judgment on March 14, 2011. Rehearing was denied on May 10, 2011. The petition was filed on August 8, 2011, and granted on November 28, 2011. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment, 28 U.S.C. § 2111, and Federal Rule of Criminal Procedure 52(a) are reproduced at App. 1.

STATEMENT OF THE CASE

1. The Underlying Incident

In August 2008, Alejandro Diaz, a DEA informant, arranged a cocaine purchase with Carlos Cruz. J.A. 36-38. On August 5th, Diaz met with Cruz and his buyer, Joel Perez, at a gas station in Arlington Heights, Illinois. J.A. 40-42, 190. Cruz and Perez rode to the meeting in Cruz's car. J.A.194-95. At the meeting, Diaz told them to follow him to

another location to view the cocaine. J.A. 213. Instead of following Diaz, Perez walked toward his car, a Bonneville, which was parked in a nearby parking lot, and got in the passenger seat. Petitioner, Perez's cousin, was in the driver's seat. J.A. 50-51, 218-23.

At that point, six officers ran toward the vehicle, some with guns drawn. J.A. 127. According to an agent, Petitioner reversed the vehicle as agents approached, collided with law enforcement vehicles parked less than a car-length behind, and drove toward the lot's exit with Perez in the passenger seat. J.A. 73-74. Shortly thereafter, agents located the Bonneville in a nearby Wal-Mart lot. J.A. 339. Petitioner and Perez were found at a McDonald's and arrested after a brief pursuit. J.A. 339-41, 354-57, 364-67. Inside the Bonneville, officers located $24,000 in a compartment where the airbag should have been. J.A. 123-24.

Cruz and Perez pled guilty to drug conspiracy. J.A. 14, 459.

2. The Trial

Petitioner proceeded to trial on charges of conspiring to possess with intent to distribute cocaine and attempting to possess with the intent to distribute cocaine. Pet. App. 5A. His defense was that he was an innocent bystander who was picking up his cousin, Perez, as a favor to Perez's wife; he had no knowledge about any drug deal. J.A. 646-47, 681.

The government's main witness, Cruz, testified pursuant to a plea agreement. J.A. 163.

Without the agreement, Cruz believed he would face a ten-year mandatory minimum sentence. J.A. 251-52. With the agreement, he believed his sentence would be cut by more than half, to about four years. J.A. 253. Cruz admitted that the reduced sentence was the reason he testified. J.A. 253.

According to Cruz, the cocaine deal was supposed to be between him, Perez, and Diaz only. J.A. 242-44. Cruz had never spoken to Petitioner and had no expectation that Petitioner would be there on August 5th. J.A. 241-49. Indeed, Petitioner was not mentioned on any of the consensually-recorded phone calls about the transaction. J.A. 122. Cruz testified that no money was to be brought to the meeting. J.A. 240-43. The meeting's purpose was for Perez to inspect the cocaine. Purchase would occur another time. *Id.*

Cruz testified that his interaction with Petitioner was brief and occurred immediately before his arrest. It was then that, as Cruz was standing next to the Bonneville, Perez said, "We've got the money here." J.A. 223. Cruz claimed that, immediately thereafter, Petitioner, who was in the car, repeated the same words. *Id.* According to Officer Chupik, however, Cruz never mentioned this statement to agents until a few days before trial, J.A. 389, even though Cruz had met with agents repeatedly about the case during the year following his arrest, see J.A. 265-68, 389. Cruz denied not telling the police earlier. J.A. 271.

Cruz's credibility was also otherwise undercut. He openly admitted that he "lied" when he first talked with agents by claiming that he met Petitioner before the meeting in Arlington Heights

when, in truth, he had never met him before. J.A. 255-57. He admitted that he lied because he was trying to tell the agents "what they want[ed] to know at that time." J.A. 257. During closing, the government conceded that Cruz had lied, both about what he said immediately after his arrest and about whether he had been read his Miranda rights. J.A. 703.

In addition to Cruz's testimony, the government presented evidence of Petitioner's six-year-old conviction for delivery of a controlled substance, J.A. 320, in which Petitioner and Perez sold cocaine to an informant. During the delivery, Petitioner personally spoke to, accepted money from, and provided cocaine to an informant. J.A. 321-23. He did none of those things in this case. J.A. 114.

The government elicited evidence about Petitioner's flight through the testimony of Cruz and Officers Chupik and Hayes. J.A. 73-74, 232-33, 330-32. Via cross-examination and admission of photos, Petitioner identified inconsistencies in their descriptions, showing the possibility that the police may have caused the collision of the vehicles. J.A. 128-35, 237-40, 381-84, 395-97, 664-68. Officer Chupik also testified that Petitioner was on parole at the time he fled. J.A. 127-28.

The government presented a phone record summary chart that showed numerous phone calls between Perez and Petitioner. J.A. 87-95. Petitioner identified calls omitted from the government's chart and presented a chart of his own and testimony that, as family, he and Perez regularly exchanged calls. J.A. 99-113, 385-88.

Petitioner put on witnesses to support his innocent bystander defense. Mayra Vasquez, Alexander Vasquez, Jr., and Alexander Jason Vasquez—each related to Petitioner—all testified that, while the car was titled in Mayra's name, see J.A. 324, the Bonneville was owned and regularly driven by Perez, not Petitioner, and that Petitioner drove a different car. Petitioner introduced corroborating records. J.A. 399-403, 408-10, 420-22.

Petitioner then called Marina Perez, Perez's wife, to explain the innocent reason for Petitioner's presence in the Bonneville at the scene. Mrs. Perez testified involuntarily pursuant to subpoena. J.A. 424. She testified that on August 5th she was shopping with her husband and son. They drove the Bonneville. J.A. 426-28. After completing their shopping, they drove to Petitioner's residence to help him with his disabled mother (Perez's aunt). J.A. 428-31. Shortly thereafter, Perez received a call and told his wife he was leaving with a friend. J.A. 431. She wanted him to stay and they argued. J.A. 431-32. Perez was picked up by an unknown individual around 4:00 p.m. J.A. 432, 436. Perez asked Mrs. Perez to pick him up in Arlington Heights when he called her. He gave her the Bonneville keys. J.A. 432.

Angry with her husband, Mrs. Perez asked Petitioner if he would pick Perez up in Arlington Heights if she stayed with his mother. J.A. 434-35. Petitioner agreed. J.A. 435. After realizing that Perez's Bonneville was blocking his vehicle in the garage, Petitioner returned to the house and Mrs. Perez gave him the keys to the Bonneville. J.A. 435-39. According to Mrs. Perez, it was mere happenstance that Petitioner was the one who

responded to Perez's request to be picked up.

During cross-examination, government counsel did not impeach Mrs. Perez's testimony despite a continuance to collect her thoughts. J.A. 445-49. Over the weekend, the government reviewed hours of recorded jail calls between Mr. and Mrs. Perez. Government counsel then moved for a one-day continuance to prepare to recall Mrs. Perez and play recordings. The continuance was granted over objection and the jury was sent home without hearing any evidence that day. J.A. 458-70.

The recordings included Mr. and Mrs. Perez recounting statements allegedly made by *Petitioner's trial counsel*, which were either conveyed directly to Mrs. Perez or conveyed to Mr. Perez by Petitioner. These included counsel telling Petitioner that "everyone is going to lose" at trial and that Petitioner should plead guilty. J.A. 769, 771. Over objection, the court admitted the recordings for their truth. J.A. 517-18. During his examination of Mrs. Perez, government counsel thrice repeated Petitioner's attorney's purported statement that, if they went to trial, "everyone was going to lose." J.A. 533-34. After the jury heard on three separate occasions that Petitioner's attorney thought Petitioner would lose at trial, they heard it a fourth time: the government admitted and played the recordings through another witness after Mrs. Perez left the stand. J.A. 565-73.

In closing, both parties repeatedly referenced Mrs. Perez and the erroneously-admitted recordings. J.A. 644-46, 680-91, 710-17. The government specifically asked the jury to rely on the recordings as proof that Mrs. Perez lied. J.A. 644-46, 716-18.

The court gave the jury cautionary instructions regarding flight evidence and prior bad act evidence. J.A. 722, 724-25. Deliberations began on September 2, 2009, and reconvened at 9:00 a.m. on September 3rd. J.A. 737. At 10:30 a.m. on September 3rd, the jury sent a note requesting transcripts of Mrs. Perez's "testimonies," J.A. 739; in response, the court instructed the jury to rely on their memory, J.A. 741. The jurors deliberated until 4:35 p.m., a total deliberation time of over eight hours. J.A. 744.

The jury convicted Petitioner of conspiracy to possess with intent to distribute cocaine and acquitted him of attempting to possess with intent to distribute cocaine. J.A. 745. Petitioner was sentenced to 20 years incarceration. J.A. 2 (Dkt.152).

3. The Court of Appeals' Decision

On appeal, Petitioner argued that the district court committed reversible error by admitting the recordings for their truth. The Seventh Circuit agreed that the admission of the recordings was error, but the majority found the error harmless and affirmed Petitioner's conviction. J.A. 4.

The majority based its harmlessness determination solely on its view that, in a trial without the erroneously-admitted recordings, Petitioner would have been convicted due to the strength of the untainted evidence. Pet. App. 17A-18A. In so doing, the majority relied, in part, on the facts that Petitioner did not testify and that his codefendants pled guilty. Pet. App 11A-12A. The majority also cited flight evidence, prior conviction

evidence, and Cruz's testimony about Petitioner saying, "We got the money." Pet. App. 17A-18A. The majority did not address the error's effect, the defense evidence, the government's emphasis of the erroneously-admitted recordings, the jury's request for transcripts of Mrs. Perez's "testimonies," or the split-verdict.

Judge Hamilton dissented. He noted that the purpose of harmless-error analysis is "not to become in effect a second jury." Pet. App. 24A (internal quotation marks omitted). He then proceeded to consider the evidence with a focus on the error's effect. *Id.* He examined the entire record and noted the relative weakness of the government's case against Petitioner, the impeachment of Cruz, the significance of Mrs. Perez's testimony, the intensity of the government's desire to admit the recordings, the government's emphasis on the recordings, the split-verdict, and the error's potential impact. Pet. App. 24A-29A. He found that the error could not be harmless.

This Court granted Petitioner's petition for certiorari on November 28, 2011.

SUMMARY OF ARGUMENT

Petitioner's jury heard erroneously-admitted evidence that Petitioner's own lawyer said he would lose if he went to trial and that he should plead guilty. The majority below determined this error harmless. But it did so without considering the error's effect.

Since the enactment of the first harmless-error statute, this Court has consistently applied the same mode of harmless-error analysis. That analysis requires consideration of an error's effect in the context of the entire record. The goal is to determine whether the error influenced the jury. The Court has repeatedly warned against any form of harmless-error analysis that asks only whether the defendant would have been convicted in an error-free trial. The proper question is whether the jury's verdict was uninfluenced by error.

Courts like the majority below have misinterpreted this Court's harmless-error jurisprudence. Focusing on isolated statements in a few cases, these courts have subverted the original purpose of the harmless-error analysis and adopted a test that focuses solely on whether there was overwhelming independent evidence of guilt. This "overwhelming evidence" test strips the error out of the trial and then asks judges to speculate how an error-free trial would come out. However, this test cannot be squared with this Court's consistent application of a harmless-error rule that focuses on an error's potential impact on the jury's verdict.

The Sixth Amendment right to a jury trial also compels the use of a harmless-error test that takes an error's effect into account. When a judge asks only whether the defendant would be convicted in a trial without error, that judge is making a guilt determination. This Court has held that the jury-trial right requires that guilt determinations be made by juries, not judges. Thus, any harmless-error analysis based on a court's assessment of whether a hypothetical, error-free trial would yield conviction violates the Sixth Amendment.

In this case, the majority below applied a harmless-error test that this Court has never endorsed. The majority failed to consider the error's potential effect on the jury and the weight of the evidence in the context of the entire record. As the dissent observed, the government's case against Petitioner was far from overwhelming. It was based largely on circumstantial evidence and hotly contested on every important point. Moreover, through the testimony of Marina Perez, Petitioner presented evidence of actual innocence, which the government could not disprove. With no legitimate means of challenging Mrs. Perez's testimony, the government utilized recordings, erroneously admitted for their truth, which indicated that Petitioner's trial attorney said he would lose at trial and should plead guilty. The government emphasized the statements repeatedly in questioning, played the recordings themselves, and referenced them in closing argument. Under any test, this significant error was not harmless.

ARGUMENT

I. BECAUSE THE MAJORITY FAILED TO CONSIDER THE ERROR'S EFFECT ON THE JURY, IT VIOLATED RULE 52(A) AND 28 U.S.C. § 2111.

The purpose of harmless-error analysis has always been to preserve a jury's verdict, not to supplant it. The relevant statutes and this Court have consistently required courts to conduct a thorough review of the entire record before declaring an error harmless. The purpose of this review is not for the reviewing court to become "in effect a second jury," but instead to determine whether the error may have affected the jury's verdict. *Neder v. United States*, 527 U.S. 1, 19 (1999). Indeed, a contrary rule would raise serious Sixth Amendment concerns.

At times, the Court has variously phrased the harmless-error test, resulting in misinterpretations by some courts. However, an examination of the Court's jurisprudence as a whole reveals an analysis with a singular purpose: to ensure that errors with no real effect on a trial do not result in reversal. This purpose was expressed in the original harmless-error statute, in the Court's subsequent interpretations, and in the rule's current form. The mode of analysis and standard of persuasion (or level of certainty)[1]

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[1] For constitutional errors on direct appeal, courts ask whether it is beyond a reasonable doubt that the error did not affect the jury. *Chapman v. United States*, 386 U.S. 18, 24 (1967). For constitutional errors on collateral review and for non-constitutional errors, courts ask whether there is fair assurance

may change depending on the nature of the error, but the inquiry at its core remains the same: Can the reviewing court say that the error did not affect the jury's verdict?

The majority below departed from this analysis because it did not consider the error's effect on the jury. Instead, it stripped the error from the trial and decided whether an average jury would still have found the defendant guilty. Pet. App. 17. Because this analysis violates this Court's harmless-error precedent, the decision must be reversed.

A. Both This Court And Congress Have Required That Courts Conducting Harmless-Error Review Consider The Effect Of The Error.

The first harmless-error statute was passed in 1919. It provided: "On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." 28 U.S.C. § former 391 (1919). Thereafter, the Court decided a series of cases that established the proper mode of harmless-error analysis. Those cases held that the purpose of the harmless-error rule was to determine the error's effect, not to make an independent assessment of

---

that the error did not have a substantial and injurious effect. *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993). Thus, the ingredients of the analysis are identical; but the level of confidence required varies.

guilt.

The original cases interpreting the harmless-error rule confined findings of harmlessness to errors concerning extremely minor or technical matters. In *Bruno v. United States*, the Court noted that the rule "was intended to prevent matters concerned with the mere etiquette of trials and with the formalities and minutiae of procedure from touching the merits of the verdict." 308 U.S. 287, 294 (1939).

Even as the rule was expanded to embrace more substantial errors, the Court carefully noted that it was "not authorized to look at the printed record, resolve conflicting evidence, and reach the conclusion that the error was harmless because we think the defendant was guilty." *Weiler v. United States*, 323 U.S. 606, 611 (1945). To do so "would be to substitute our judgment for that of the jury." *Id.* The Court warned that despite the rule's important purpose—to encourage confidence in the justice system by not overturning verdicts based on inconsequential errors—a court could not supplant the jury's judgment with its own:

> From presuming too often all errors to be "prejudicial," the judicial pendulum need not swing to presuming all errors to be "harmless" if only the appellate court is left without doubt that one who claims its corrective process is, after all, guilty.

Bollenbach v. United States, 326 U.S. 607, 615 (1946). This is because "the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure

and standards appropriate for criminal trials." *Id.* at 614.

Kotteakos v. United States remains the seminal case explaining the purpose and proper mode of harmless-error analysis. 328 U.S. 750 (1946). In *Kotteakos*, the court of appeals had found that the district court erred by trying separate conspiracies together. *Id.* at 752. However, it had held that that the error was not prejudicial because "guilt was so manifest." *Id.* at 755. This Court reversed, holding that the error was not harmless. *Id.* at 774. In doing so, the Court carefully analyzed the harmless-error rule.

The Court explained that the contemporary harmless-error rule "grew out of widespread and deep conviction ... that courts of review, 'tower above the trials of criminal cases as impregnable citadels of technicality.'" *Id.* at 759. Thus, the purpose of the rule was "to substitute judgment for automatic application of rules." *Id.* Colloquially phrased, the harmless-error rule instructed "[d]o not be technical, where technicality does not really hurt the party whose rights in the trial and in its outcome the technicality affects." *Id.* at 760.

Kotteakos is full of warnings for courts conducting harmless-error analysis. First, "it is not the appellate court's function to determine guilt or innocence." *Id.* at 763. And courts cannot "speculate upon probable reconviction and decide according to how the speculation comes out." *Id.* The Court made clear that a reviewing court's opinion of the evidence's weight is an inescapable component of the analysis, but it cannot be "the sole criteria." *Id.* at 764. According to the Court, "the crucial thing is the

impact of the thing done wrong on the minds of other men, not on one's own, in the total setting." *Id.* The Court noted that the importance of this distinction is paramount "when the sense of guilt comes strongly from the record." *Id.*

In making a harmless-error determination, courts must consider "all that happened" and must do so "without stripping the erroneous action from the whole." *Id.* at 765. "That conviction would, or might probably, have resulted in properly-conducted trial is not the criterion of [harmless-error inquiry]." *Id.* at 776; *Bihn v. United States*, 328 U.S. 633, 638-39 (1946) (noting that it is not "enough for us to conclude that guilt may be deduced from the whole record").

In the years following *Kotteakos*, the Court repeatedly emphasized that the proper focus of the harmless-error inquiry is the effect on the jury. See *Fiswick v. United States*, 329 U.S. 211, 218 (1946) ("[w]e cannot say with fair assurance in this case that the jury was not substantially swayed by the use of these admissions against all petitioners"); *Carpenters v. United States*, 330 U.S. 395, 408 (1947) (reversing a conviction because there was "no way of knowing here whether the jury's verdict was based on facts within the condemned instructions").

After this succession of cases consistently applying the harmless-error rule, Congress reenacted the harmless-error statute in 1949. See 28 U.S.C. § 2111. When Congress reenacts a statute after the court has developed an established interpretation, this Court presumes that Congress is aware of settled judicial interpretations of the statute, *Lirillard v. Pons*, 434 U.S. 575, 580 (1978),

and intended to adopt those interpretations. *Keene Corp. v. United States*, 508 U.S. 200, 212 (1993).

In this instance, not only did Congress reenact the statute, it explicitly indicated its intention to recodify the former rule. See Fed. R. Crim. P. 52 Advisory Committee Notes ("This rule is a restatement of existing law"); *United States v. Lane*, 474 U.S. 438, 454 (1986) (recodification of harmless-error without the word "technical" "did not alter the substantive legal test"). The House Report accompanying the bill specifically noted that it was incorporating "the harmless error provisions of [28 U.S.C. § 391]." H.R. Rep. No. 352, at 18, 81st Cong. (1st Sess. 1949). Thus, it is presumed that Congress intended 28 U.S.C. § 2111 to maintain this Court's initial interpretation in *Kotteakos*.

B. This Court's Analysis In Every Case Applying The Harmless-Error Rule Since The Enactment of 28 U.S.C. § 2111 Has Been Consistent With *Kotteakos*.

Following the reenactment of the harmless-error statute, the Court continued to apply the effect-on-the-error test announced in *Kotteakos*. See *Stewart v. United States*, 366 U.S. 1, 9 (1961) (reversing conviction based on prosecutor's improper comment where "it [was] apparent that the jury's awareness of petitioner's failure to testify at his first two trials could have affected its deliberations"). It has never strayed from this analysis even when it has expanded the number of errors subject to the analysis.

In *Fahy v. Connecticut*, 375 U.S. 85 (1963), and *Chapman v. United States*, 368 U.S. 18 (1967), this Court expanded the application of harmless error to constitutional errors. In doing so, the Court kept the inquiry's focus on the error's effect on the jury that heard the case. The *Fahy* Court inquired "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." 375 U.S. at 86-87. In *Chapman*, the Court similarly noted that, "like the federal harmless-error statute," the constitutional rule requires reversal where there was "an error in admitting plainly relevant evidence which possibly influenced the jury." 368 U.S. at 23-24.

In *United States v. Hasting*, the Court considered whether a prosecutor's comment on the defendant's failure to testify was harmless. 461 U.S. 499, 502 (1983). The Court focused its analysis on the jury that heard the case. "A reviewing court must begin with the reality that the jurors sat in the same room day after day with the defendants and their lawyers" *Id.* at 510. The Court assessed the evidence presented and found that "it could hardly have escaped the attention of the jurors" that the defense "presented patently and totally inconsistent theories." *Id.* at 512. Thus, the Court found the error harmless because it could not have affected the jury. *Id.*

In *Arizona v. Fulminante*, the Court held that the wrongful admission of a confession could be harmless. 499 U.S. 279, 295 (1991). But, the Court found that the error in *Fulminante* was not harmless. *Id.* at 297. The Court noted that the prosecutor emphasized the erroneously-admitted

confession, *id.* at 298, and that the error led to the admission of other prejudicial evidence, *id.* at 300. These considerations demonstrate the Court's focus on the error's effect. Prosecutorial emphasis of an error would be irrelevant to an inquiry that simply asked whether the defendant would have been convicted without error. Yet, the Court has repeatedly considered this factor in harmless-error analysis. See, *e.g.*, *Brecht v. Abrahamson*, 507 U.S. 619, 626 (1993) (noting infrequency of state's references to defendant's post-Miranda silence in finding error harmless).

In *O'Neal v. McAninch*, the Court phrased the inquiry as "Do I, the judge, think that the error substantially influenced the jury's decision?" 513 U.S 432, 436 (1995). Again, consistent with *Kotteakos*, the Court focused on the error's impact on the jury that heard the case.

Unfortunately, *Kotteakos*'s command is not always easy to follow when reviewing courts believe the defendant guilty. The temptation to supplant the jury's deliberation with the court's has led to a variety of harmless-error analyses including the overwhelming-evidence test, which is inconsistent with *Kotteakos*.

C. Courts That Apply The Overwhelming-Evidence Test Have Misinterpreted This Court's Precedent.

Despite this Court's consistent application of a harmless-error test that requires consideration of an error's effect, some lower courts have misread

language in this Court's opinions to allow an alternative test.[2] This alternative test ignores the nature and effect of the error and instead looks at the remaining evidence to determine whether it is so overwhelming that the defendant surely would have been convicted absent the error. This is the "overwhelming-evidence test."

The difference between the tests is significant. A court applying the effect-on-the-verdict test must review the entire record to determine the nature and effect of the error. The scope of this inquiry includes the extent to which the error was emphasized and whether the jury's verdict or conduct indicates that the error was influential. On the other hand, a court applying the overwhelming-evidence test has no need to consider the nature and effect of the error because it asks only whether the untainted evidence was sufficient to assure conviction.

The overwhelming-evidence test can be traced to language in two cases: *Harrington v. United States*, 395 U.S. 250 (1969), and *Schneble v. Florida*, 405 U.S. 427 (1972). Neither of these cases, however, created an "overwhelming-evidence" rule. Rather, in both cases, the Court repeated the familiar rule of *Kotteakos* and *Chapman*, but, while applying it, made statements that some courts took out of

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[2] See Roger A. Fairfax, Jr., *Harmless Constitutional Error and the Institutional Significance of the Jury*, 76 Fordham L. Rev. 2027, 2037 (2008) (noting authorities finding two tests); *United States v. Peck*, 102 F.3d 1319, 1326 (2d Cir. 1996) (Newman, CJ concurring) (noting the uncertainty present in "most cases" of "whether the reviewing court is to consider the effect of the error on the jury or predict what verdict would have been rendered in the absence of the error").

context.

In *Harrington*, the Court considered whether a *Bruton* violation was harmless under the *Chapman* standard. 395 U.S. at 252. The Court made clear that *Harrington*'s holding was not intended to modify that standard in any way. "We do not depart from *Chapman* nor do we dilute it by inference. We reaffirm it." *Id.* at 254. Despite this plain admonition, some courts have read *Harrington*'s language to permit harmlessness determinations based solely on the court's finding of overwhelming evidence. See, *e.g.*, *United States v. Holmes*, 620 F.3d 836, 844 (8th Cir. 2010) ("[e]vidence erroneously admitted ... is harmless ... as long as the remaining evidence is overwhelming").

The language in *Harrington* that the lower courts have misinterpreted stated: "It is argued that we must reverse if we can imagine a single juror whose mind might have been made up because of [the codefendants'] confessions and who otherwise would have remained in doubt and unconvinced. We of course do not know the jurors who sat. Our judgment must be based on our own reading of the record and on what seems to us to have been the probable impact on the minds of an average jury." *Harrington*, 395 U.S. at 254. The Court went on to conclude that "apart from [the codefendants' confessions] the case against Harrington was so overwhelming that we conclude that this violation of *Bruton* was harmless beyond a reasonable doubt." *Id.*

Taken out of context, these statements have been read by certain courts of appeals to allow courts to simply guess whether a reasonable jury would have convicted in a trial without error. However, a

closer look at *Harrington* reveals a much narrower holding.

First, *Harrington* was decided based on its unique facts. The Court noted that its decision was tied to those facts: "We granted the petition for certiorari to consider whether the violation of *Bruton* was on these special facts harmless error under *Chapman*." *Id.* at 252; see also *id.* at 253 ("we conclude on these special facts [the error was] ... harmless"); and at 254 ("[o]ur decision was based on the evidence in this record").

Second, the Court's reference to "the minds of an average jury" did not announce a new rule. Obviously, a reviewing court will consider how an error would affect an average jury. Such considerations are inescapable since there is seldom direct proof of the jury's impression of evidence.[3] Nonetheless, the *Harrington* Court attempted to determine whether the error influenced the jury that heard the evidence by examining the error's nature. It did not hypothesize an error-free trial and a hypothetical jury's reaction thereto. It is one thing to inquire how the error as presented would affect a reasonable person—often that is a reviewing court's best means of determining an error's probable effect. It is quite another thing to ask whether a jury that did not hear the error would convict. Nothing in *Harrington* can be read to allow a reviewing court to hypothesize an error-free trial and ignore the error's potential effect or specific indications that it influenced the jury's decision.

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[3] There is, however, such proof in this case. See *infra* at 55-57, 62-63.

Third, *Harrington*'s reference to "overwhelming evidence" did not create a new test. Although *Harrington* referred to the evidence as "overwhelming" when finding the erroneous admission of codefendants' statements harmless, it also noted that the evidence was cumulative, and the facts it established uncontested. In fact, *Harrington* referenced *Chapman*'s warning against "giving too much emphasis to 'overwhelming evidence' of guilt." *Id.* at 253. *Harrington* is nonetheless sometimes cited as typifying the "overwhelming evidence" standard. See Gregory Mitchell, *Against "Overwhelming" Appellate Activism: Constraining Harmless Error Review*, 82 Cal. L. Rev. 1335, 1343 (1994) (citing *Harrington* as source of the overwhelming-evidence test).

Harrington's holding was based more on the cumulative nature of the erroneously-admitted evidence than on the fact that the Court believed other evidence "overwhelming." The inadmissible statements in *Harrington* placed the defendant at the scene of the crime. But the defendant himself "agreed he was there." 395 U.S. at 253. The Court focused on the error's nature and found that the "[erroneously-admitted] evidence, supplied through [codefendants'] confessions, was of course cumulative" and, hence, unlikely to impact the verdict. *Id.* at 254.

Many courts, including this one, have explicitly incorporated consideration of whether erroneously-admitted evidence is cumulative into harmless-error analysis. See *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986) ("whether such an error is harmless depends on [among other factors]

whether the testimony was cumulative"); *Brown v. United States*, 411 U.S. 223, 231 (1973) (finding error harmless because it was cumulative); *Wray v. Johnson*, 202 F.3d 515, 526 (2d Cir. 1998) (including "whether the wrongly admitted evidence was ... cumulative" in list of harmless error factors). If erroneously-admitted evidence is cumulative of a defendant's own admission, a jury has no reason to rely on it. See *Wray*, 202 F.3d at 526 (cumulative evidence "is less likely to have injuriously influenced the jury's verdict").

Courts applying the overwhelming-evidence test also frequently cite *Schneble v. Florida*. But, *Schneble*, like *Harrington*, faithfully applied the *Kotteakos* and *Chapman* standard. It correctly announced the test: whether "there is a reasonable possibility that the improperly admitted evidence contributed to the conviction." 405 U.S. 427, 432 (1972). But, the Court went on to explain, "[i]n this case, we conclude that the 'minds of the average jury' would not have found the State's case significantly less persuasive had the testimony ... been excluded." *Id.* (quoting *Harrington*, 395 U.S. at 254).

Taken out of context, the reference to "the minds of the average jury" can be read to endorse ignoring the trial that took place and instead relying on the court's hypothetical evaluation of an error-free trial. But *Schneble*'s holding renders that interpretation impossible.

The error in *Schneble* was the admission of a codefendant's confession in violation of *Bruton*. In holding that error harmless, the Court noted that Schneble himself gave a "minutely detailed" confession. 405 U.S. at 430. The confession was

"completely consistent with the objective evidence." *Id.* The Court noted that the erroneously-admitted statement "at most tended to corroborate certain details of petitioner's comprehensive confession." *Id.* at 431.

The Court emphasized that the jury's verdict was necessarily based upon that confession. According to the Court, without Schneble's confession, "the State's case [] was virtually non-existent." *Id.* Because the jury convicted the defendant, the Court "concluded that petitioner's confession was considered by the jury." *Id.* at 432. Consequently, the codefendant's corroborative confession was cumulative. Knowing this, the court concluded that the erroneously-admitted cumulative evidence did not influence the jury. Thus, the Court's analysis hinged on the erroneously-admitted evidence's cumulative nature and lack of impact on the jury, not on the existence of overwhelming independent evidence.

When a jury convicts, it proceeds analytically from the presumption of innocence to finding guilt beyond a reasonable doubt. Harmless-error analysis aims to insure that the error does not sway this process. With erroneously-admitted cumulative evidence, there is less reason to believe that the jury relied on it because it could rely upon other admissible evidence establishing the same facts. Where erroneously-admitted evidence is not cumulative and bears on an important issue, juries are more likely to assign it independent significance.

After *Schneble*, the Court never phrased the harmless-error inquiry as whether "the 'minds of an average jury' would not have found the State's case

significantly less persuasive [absent the error]." The Court has only referenced an analysis of whether "the minds of an average jury" would have found the untainted evidence sufficient to convict one other time—to disapprove of the analysis.

In *Satterwhite v. Texas*, the Court applied harmless-error analysis in the context of death penalty sentencing. 486 U.S. 249 (1988). The court of appeals had found that erroneous admission of a psychiatric report "was harmless because 'the properly admitted evidence was such that the minds of an average jury would have found the State's case [on future dangerousness] sufficient ... even if Dr. Grigson's testimony had not been admitted.'" *Id.* at 258. This Court rejected this analysis: "The question, however, is not whether the legally admitted evidence was sufficient to support the death sentence, which we assume it was, but rather, whether the State has proved 'beyond a reasonable doubt' that the error complained of did not contribute to the verdict obtained." *Id.* at 258-259.

Despite the Court's repudiation of standards focusing narrowly on what an average jury would have done absent the error, the Seventh Circuit uses that standard frequently.[4] The majority below demonstrated its use of the forbidden

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[4] See, *e.g.*, *United States v. Thorton*, 642 F.3d 599, 605 (7th Cir. 2011) (asking whether the "average juror" would find evidence "significantly less persuasive" absent the error); *United States v. Yarrington*, 640 F.3d 772, 780 (7th Cir. 2011) (same); *United States v. Hicks*, 635 F.3d 1063, 1073 (7th Cir. 2011) (same); *United States v. Spagnola*, 632 F.3d 981, 988 (7th Cir. 2011) (same).

"overwhelming-evidence"[5] test by not mentioning the error's nature, its potential effect, or the fact that the jury returned a split-verdict. As this Court's precedent demonstrates, an inquiry that concludes that the untainted evidence "*would have* moved the jury to convict [the defendant] without a nudge from [the error]," (emphasis added) is insufficient. Pet. App. 17A. Thus, the Seventh Circuit applied the wrong test.

D. Cases Involving Omitted Elements Or Instructional Errors Do Not Support The Position That Overwhelming Evidence Is Dispositive In The Harmless-Error Inquiry.

Because instructional errors can affect the scope and nature of a jury's inquiry, such errors can complicate harmless-error analysis. For instance, if a jury is instructed that it can presume an element of an offense when if finds particular facts (*Sandstrom* error), it is difficult to determine whether the instruction substantially influenced the jury's verdict. Similarly, if a jury did not reach a decision on an element because it was omitted, determining how the omission of the element affected the jury is necessarily speculative. The special influence that jury instructions have on jury determinations has led the Court to hold that at least one instructional error—a defective reasonable doubt instruction—is structural. *Sullivan v. Louisiana*, 508 U.S. 275

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5 The majority below did not use the phrase "overwhelming evidence," but it applied the test in effect.

(1993).

The Court's analysis of instructional errors is consistent with the harmless-error analysis this Court has consistently applied since the rule's inception. Only in the rare circumstance of an omitted element has the Court asked whether the jury would have returned the same verdict absent the error. When it has done so it has required that the omitted element be uncontroverted and incontrovertible before finding the omission harmless. In such cases, it is fair to say that the error did not influence the jury. *Neder*, 527 U.S. at 17.

1. Instructional Errors That Narrow The Jury's Inquiry

"An erroneous presumption on a disputed element of the crime renders irrelevant the evidence on the issue because the jury may have relied upon the presumption rather than upon that evidence." *Connecticut v. Johnson*, 460 U.S. 73, 86 (1983). And where a jury "may have failed to consider evidence [on an element], a reviewing court cannot hold that the error did not contribute to the verdict." *Id.* The Court has been clear that when it appears that the jury may not have considered evidence on a disputed element, "[t]he fact that the reviewing court may view the evidence of intent as overwhelming is then simply irrelevant." *Id.*

> To allow a reviewing court to perform the jury's function of evaluating the evidence of intent, when the jury never may have performed that function,

> would give too much weight to society's interest in punishing the guilty and too little weight to the method by which decisions of guilt are made.

Id.

Thus, where a jury is given an erroneous presumption instruction, the inquiry remains the same: Did the error (*i.e.*, the presumption) affect the verdict? *Yates v. Evatt*, 500 U.S. 391, 404-05 (1991). In *Yates*, the Court reviewed a decision of the Supreme Court of South Carolina finding the use of an erroneous instruction to be harmless because the court believed "it is beyond a reasonable doubt that the jury would have found it unnecessary to rely on the erroneous mandatory presumption regarding the element of malice." *Id.* at 399. The Court found that this was the wrong standard because "[e]nquiry about the necessity for reliance ... does not satisfy all of *Chapman*'s concerns." *Id.* at 407. The Court found it insufficient to say that the verdict would have been the same absent the error:

> [Enquiry about the necessity for reliance] can tell us that the verdict could have been the same without the presumptions, when there was evidence sufficient to support the verdict independently of the presumptions' effect. But the enquiry will not tell us whether the jury's verdict did rest on that evidence.

Id. at 407.

In this situation, the reviewing court "must ask what evidence the jury actually considered in

reaching its verdict." *Id.* at 404. The reviewing court then weighs the probative force of that evidence against the probative force of the presumption standing alone (*i.e.*, the error's effect). *Id.* at 404-05. Only through this comparison can a court assure itself that an erroneous presumption did not influence the jury. *Id.*

Even instructional errors that preclude consideration of an element (either through a mandatory presumption or an omitted element) can in some rare situations be harmless. *Id.* at 87; *Rose v. Clark*, 478 U.S. 570, 580 (1986). But such errors are only harmless in cases where it is certain that the error did not affect the verdict. *Rose*, 478 U.S at 580-581.

Mandatory presumptions can be harmless where the predicate facts for the presumption "conclusively establish [the element], so that no rational jury could find [the predicate facts], but [] not [find the element itself]." *Rose*, 478 U.S. at 580-81; see also *Pope v. Illinois*, 481 U.S. 497, 504 (1987) (Scalia, J., concurring) (holding misdescribed element harmless because no rational juror could have found the misdescribed element without also implicitly finding the correct element). In such situations it is impossible that the error affected the jury.

Similarly, in *Neder*, the Court held that the omission of an element of the offense could be harmless error in limited circumstances. 527 U.S. 1; see also *Washington v. Recueno*, 548 U.S. 212, 220 (2006) (holding *Apprendi* error is subject to harmless-error analysis). However, the omission of an element can be harmless only where the omitted

element is uncontroverted and incontrovertible. *Neder*, 527 U.S. at 17.

The element at issue in *Neder* was materiality. The Court rejected the argument that the omission of an element was structural error, finding that "[i]n this situation, where a reviewing court concludes beyond a reasonable doubt that the omitted element was *uncontested and supported by overwhelming evidence*, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found harmless." *Id.* (emphasis added).

Thus, *Neder*'s holding was that where the Court can categorically rule out an effect on the jury because an element is uncontested, an omitted element can constitute harmless error. *Neder* was carefully confined to the facts of that case. The Court repeatedly emphasized the fact that the missing element was uncontested, thereby focusing on the trial that actually occurred.[6]

The facts are also important. The Court noted that many courts of appeals had held that "any

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[6] See *id.* at 15 ("petitioner does not suggest that he would introduce any evidence bearing upon the issue of materiality if so allowed"); at 16 (noting that evidence "incontrovertibly establishes" materiality); at 17 ("Neder did not argue to the jury—and does not argue here—that his false statements of income could be found immaterial"); at 17 ("omitted element was uncontested and supported by overwhelming evidence"); at 18 ("omitted element is supported by uncontroverted evidence"); at 19 ("defendant did not, and apparently could not, bring forth facts contesting the omitted element").

failure to report income is material." *Id.* at 16. In *Neder*, the defendant was found guilty of failing to report over $5 million in income. *Id.* It could be fairly said that finding the willful failure to report $5 million in income necessarily entails a finding of materiality. See *id.* at 26 (Stevens, J., concurring) ("[t]he jury verdict, therefore, was not merely the functional equivalent of a finding on any possible materiality issue; it necessarily included a finding on that issue").

The Court did not simply ask whether there was overwhelming evidence; it repeatedly noted that the evidence was uncontroverted and incontrovertible. *Id.* at 17. And this must be the standard. If the Court lowered the standard in omitted element cases, it would necessitate the introduction of evidence at the appellate level. If an element is omitted, the defendant has no reason to introduce evidence disproving it. Therefore, assessing whether evidence related to the omitted element was "overwhelming" requires the reviewing court to provide the defendant an opportunity to proffer the evidence he would have presented on the element. The only way to avoid this absurd result is to take *Neder* at its word that the holding is based on the fact that the element was uncontroverted and incontrovertible.

In the only other case to apply harmless-error to an omitted element, the Court reached a nearly identical conclusion to that in *Neder*. *Johnson v. United States*, 520 U.S. 461 (1997). In *Johnson*, the Court found a judicial finding of materiality to be harmless error where "[m]ateriality was essentially uncontroverted at trial and has remained so on

appeal." *Id.* at 469. The Court once again focused on the fact that the omitted element was uncontroverted and incontrovertible: "[P]etitioner has presented no plausible argument that the false statement under oath for which she was convicted—lying about the source of tens of thousands of dollars she used to improve her home—was not material to the grand jury investigation." *Id.*

Importantly, the Court in *Neder* was only forced to base its decision on the uncontroverted nature of the element because the instruction did not permit the jury to decide the element. In Petitioner's case, the jury considered evidence as it related to all elements. But it also considered erroneously-admitted evidence. The issues affected by the error in this case were far from uncontroverted. Thus, failure to consider the effect on the jury was error.

2. Instructional Errors That Fundamentally Alter The Jury's Inquiry

The Court has been clear that where the instructions vitiate the jury's findings in their entirety, the error can never be harmless. In *Sullivan*, a unanimous Court held that an erroneous reasonable doubt instruction is structural error. 508 U.S. at 281-82. In reaching this conclusion the Court noted that harmless-error analysis requires "the reviewing court to consider ... not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand." *Id.* at 279. This is because harmless-error review

looks "to the basis on which 'the jury *actually rested* its verdict." *Id.* (quoting *Yates*, 500 U.S. at 404-05) (emphasis in original).

> The inquiry ... is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error.

Id. (emphasis in original).

The reasoning in *Sullivan* demonstrates that harmlessness cannot be determined without looking at the error's effect in the context of the trial that actually occurred.

E. Application Of The Overwhelming-Evidence Test Raises Serious Risks Of Sixth Amendment Violation.

The harmless-error analysis announced in *Kotteakos* struck a balance between the desire for efficiency and the commands of the Sixth Amendment. This Court's repeated insistence that reviewing courts not become, in effect, a second jury derives from the concern that improperly conducted harmless-error analysis can violate the Sixth Amendment right to a jury trial. The meaning of the jury-trial right and this Court's precedent establish that a reviewing court violates the Sixth Amendment when it disregards explicit indications from a jury of an error's importance and hypothesizes a trial without the error. Reaffirming a harmless-error test that focuses on the effect of the error would avoid this Constitutional problem. See *Boos v. Berry*, 485

U.S. 312, 331 (1988) ("federal courts have the duty to avoid constitutional difficulties by [narrowly construing statutes] if ... fairly possible").

1. The Sixth Amendment Right To A Jury Trial Requires That Guilt Determinations Be Made By Juries, Not Judges.

The right to be tried by a jury is "fundamental to the American scheme of justice." *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). The "most important element" of the right is "to have the jury, rather than the judge, reach the requisite finding of 'guilty.'" *Sullivan*, 508 U.S. at 277. The right "reflect[s] a profound judgment about the way in which law should be enforced and justice administered." *Duncan*, 391 U.S. at 155.

The right to a jury trial protects both defendants and society from the arbitrary decisions of state actors. This is why the "preservation and proper protection" of the jury-trial right "as a protection against arbitrary rule were among the major objectives ... of the Declaration and Bill of Rights of 1689." *Duncan*, 391 U.S. at 151. The reason for the jury-trial right was not the ability of juries to discern truth better than judges. See *id.* at 157 (noting criticism that juries are incapable of determining issues of fact). Instead, the jury was meant as a check on the judicial branch's power. As John Adams wrote, "[a]s the constitution requires that the popular branch of the legislature should have an absolute check, so as to put a peremptory negative upon every act of government, it requires

that the common people should have as complete a control, as decisive a negative, in every judgment of a court of judicature." The Works of John Adams, Second President of the United States 253 (Charles Francis Adams ed., 1850).

The core of the jury-trial right is its limitation of judicial power. The right to jury trial "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary." *Blakely v. Washington*, 542 U.S. 296, 305-06 (2004). In fact, Thomas Jefferson opined that it was more important that the people, through the jury, have control over the judicial branch of government as opposed to the legislative branch. The Papers of Thomas Jefferson 282, 283 (Julian P. Boyd ed., 1958).

The Framers expressed specific concern about legal doctrines that could encroach upon the jury's role and break down the important boundary between judge and jury erected by the jury-trial right. "[W]e often hear in conversation doctrines advanced for law, which, if true, would render juries a mere ostentation and pageantry, and the Court absolute judges of law and fact." Works of John Adams at 253. The jury-trial right was intended to emphasize "the important boundary between the power of the court and that of the jury." *Id.*

The English also believed the jury-trial right to be expansive and worthy of protection

> not only from all open attacks, (which none will be so hardy as to make), but also from all secret machinations, which may sap and undermine it; by introducing new and arbitrary methods of trial .... And however *convenient* these may appear at first, (as doubtless all arbitrary powers, well executed, are the most *convenient*) yet let it be remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern.

Blackstone, Commentaries, v. IV p. 350 (11th ed. 1791). The Founders brought the common law right to jury trial to America, "and interposed barriers on every side against the approaches of arbitrary power." Joseph Story, Commentaries on the Constitution of the United States § 1773 (1833). This was because the Framers feared "that the jury right could be lost not only by gross denial, but by erosion." *Jones v. United States*, 526 U.S. 227, 247-48 (1999).

The Sixth Amendment jury-trial right was "but an enlargement of the language of the Magna Carta," which had been interpreted to secure "the right of trial according to the process and

proceedings of the common law." Commentaries on the Constitution of the United States at § 1783. Thus, the Sixth Amendment right to a jury trial carries with it common-law traditions. "When the American constitutions provide for the trial by jury, they provide for the common law trial by jury; and not merely for any trial by jury that the government itself may chance to invent, and call by that name. It is the thing, and not merely the name, that is guaranteed." Lysander Spooner, An Essay on the Trial by Jury, Boston: John P. Jewett and Company (1852).

In *Apprendi v. New Jersey*, this Court reaffirmed a defendant's right to have every element of an offense proven to a jury beyond a reasonable doubt. 530 U.S. 466 (2000). This means that a judge's power to convict and sentence "derives wholly from the jury's verdict." *Blakely*, 542 U.S. at 306. Thus, the jury-trial right requires that any harmless-error analysis focus "wholly [on] the jury's verdict," not on the judge's independent view of the evidence's weight. *Id.* If the Court could ignore the jury's verdict, "the jury would not exercise the control that the Framers intended." *Id.*

2. This Court Has Held That Specifically-Enumerated Sixth Amendment Rights Require Strict Adherence.

The Court has not been entirely consistent in in its discussion of the jury-trial right in the context of harmless error. In *Van Arsdall*, the Court stated "[t]he harmless error doctrine recognizes the

principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." 475 U.S. at 681. However, more recently the Court has noted that the right to a jury trial is more robust than that. See *Apprendi*, 530 U.S. 466. If the right to a jury trial guarantees nothing more than a fair trial, it provides no more protection than the Due Process Clause. See *Withrow v. Larkin*, 421 U.S. 35, 46 (1975) (a fair trial is a requirement of due process).

This Court has warned against nullifying constitutional rights. In the context of the similar Sixth Amendment rights of confrontation and right to counsel, the Court has made plain that the Constitution means what it says:

> What the Government urges upon us here is what was urged upon us with regard to the Sixth Amendment's right of confrontation—a line of reasoning that abstracts from the right to its purposes, and then eliminates the right. Since, it was argued, the purpose of the Confrontation Clause was to ensure the reliability of evidence, so long as the testimonial hearsay bore "indicia of reliability," the Confrontation Clause was not violated. We rejected that argument ... in *Crawford v. Washington*, saying that the Confrontation Clause "commands, not that evidence be reliable, but that

> reliability be assessed in a particular manner: by testing in the crucible of cross-examination."

United States v. Gonzalez-Lopez, 548 U.S. 140, 146-147 (quoting *Crawford v. Washington*, 541 U.S. 36, 62 (2004)).

Allowing appellate speculation about a defendant's guilt (as opposed to a determination of whether error affected the jury) is based upon the same flawed reasoning. The argument is that the purpose of the jury is to reach the right result. So, if the reviewing court can assure itself of the result's accuracy (*i.e.*, that the defendant was guilty), then it is okay to dispense with trial by jury because the purpose has been accomplished. This Court used that forbidden reasoning in dicta in *Rose v. Clark*:

> [T]he thrust of the many constitutional rules governing the conduct of criminal trials is to ensure that those trials lead to fair and correct judgments. Where a reviewing court can find that the record developed at trial established guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed.

478 U.S. at 579; see *id.* at 585 (Stevens, J., concurring) (referring to these statements as "dictum").

The problem with that analysis is two-fold. First, the Constitution requires a particular method of determining guilt and it is inappropriate to "abstract[] from the right to its purposes, and then eliminate[] the right." *Gonzalez-Lopez*, 548 U.S. at

146. Second, the purposes of the jury-trial guarantee extend beyond reaching accurate results. The importance of the jury lies not in its unique ability to determine guilt or innocence where others cannot, but rather in its ability to check judicial power. *Blakely*, 546 U.S. at 296.

3. *Sullivan v. Louisiana* Establishes A Sixth Amendment Limitation On Harmless-Error Analysis.

The Court most clearly discussed the Sixth Amendment's role in harmless-error analysis in *Sullivan*. 508 U.S. 275. It defined the harmless-error inquiry with reference to the jury-trial right: "Consistent with the jury-trial guarantee, the question it instructs the reviewing court to consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand." *Id.* at 279. This language explicitly ties the harmless-error inquiry's focus to the Sixth Amendment right. Therefore, conducting improper harmless-error inquiry violates the Sixth Amendment. This is because "the Sixth Amendment requires more than appellate speculation about a hypothetical jury's action." *Id.* at 280. When a reviewing court hypothesizes a trial that occurred without error as opposed to considering the error's effect on the jury that heard the case, "the wrong entity judge[s] the defendant guilty." *Id.* (quoting *Rose*, 478 U.S. at 578).

The Court backed away from some of *Sullivan*'s language in *Neder*. The *Neder* Court noted

that some of the *Sullivan* reasoning "cannot be squared with our harmless-error cases." 527 U.S at 14. The Court distinguished between cases where an instructional error vitiates all of a jury's findings and cases where the error is the omission or misdescription of an element. *Neder* concluded that the error—omission of the materiality element—was subject to harmless-error analysis. *Id.*

The Court in *Neder* then conducted the harmless-error analysis. In doing so, it noted that, "[o]f course, safeguarding the jury guarantee will often require that a reviewing court conduct a thorough examination of the record." *Id.* at 19. This observation indicates the Court's awareness of the delicate balance that harmless-error analysis strikes.

The Court noted that the "central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence," *id.* at 18 (quoting *Van Arsdall*, 475 U.S. at 681), but also noted that the jury-trial right "was designed 'to guard against a spirit of oppression and tyranny on the part of rulers,' and 'was from the very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties.'" *Id.* (quoting *United States v. Gaudin*, 515 U.S. 506, 510-511 (1995)).

With this tension in mind, the Court delivered a narrow holding: "In a case such as this one, where a defendant did not, and apparently could not, bring forth facts contesting the omitted element, answering the question whether the jury verdict would have been the same absent the error does not fundamentally undermine the purposes of the jury-trial guarantee." *Neder*, 527 U.S. at 19.

Unlike *Neder*, where the absence of a jury finding forced the Court to determine whether the omitted element was uncontested and incontrovertible such that the error did not affect the jury, the instant case included a jury finding on every element. The harmless-error inquiry must focus on that finding, rather than speculative analysis of an error-free trial. The *Neder* Court reached its conclusion because, based on the evidence the jury heard, the defendant did not and could not contest the element. *Id.* at 19. In this case, all elements were contested. Nonetheless, the majority ignored the error's effect despite a record that provided ample grounds for assessing it.

Undoubtedly, harmless-error analysis can be conducted without violating the jury-trial guarantee. However, to do so, the reviewing court must determine that the error did not affect the jury's verdict. When a court looks only to its assessment of whether, absent error, there is overwhelming evidence, it ignores the possibility of an error-influenced verdict and supplants the jury's finding with its own. This Court can avoid this Sixth Amendment problem by reaffirming that harmless-error analysis requires examination of an error's possible effect on the jury that heard the case.

F. The Overwhelming-Evidence Test Raises Serious Fairness Concerns.

This Court's repeated focus on the effect of the error is not arbitrary. There are reasons that appellate courts are reluctant to decide issues of fact. Appellate courts do not see the demeanor or hear the

tone of witnesses who testify. Appellate courts are also not shielded from prejudicial evidence like juries are.

Judges, like juries, can and do get it wrong. Of the first 200 defendants exonerated by DNA evidence, 133 previously had their convictions affirmed in written appellate decisions. In 32% of those 133 decisions, an appellate court found an error to be harmless. Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 107 (2008). In 10% of those 133 decisions, the appellate court found harmlessness because it believed the evidence against the factually innocent defendant was "overwhelming." *Id.*

The Framers likely understood that innocent people would be imprisoned. But they certainly "would not have thought it too much to demand that, before depriving a man of [twenty years] of his liberty, the State should suffer the modest inconvenience of submitting its accusation to the "unambiguous suffrage of twelve of his equals and neighbors, rather than [the best of three] employee[s] of the state." *Blakely*, 542 U.S. at 313-314. The Court's consistent harmless-error jurisprudence reflects that principle.

II. THE WRONGFUL ADMISSION OF PETITIONER'S ATTORNEY'S STATEMENTS THAT PETITIONER SHOULD PLEAD GUILTY AND THAT PETITIONER WOULD LOSE AT TRIAL WAS NOT HARMLESS.

As the foregoing argument demonstrates, this Court has articulated a consistent harmless-error rule. First, the rule requires that courts review the entire record and evaluate the weight of the evidence in context. Second, courts must assess the error's effect. To assess the effect of the error, the court must consider the nature of the error, the importance of the evidence to which the error relates, the parties' emphasis on the error, and any specific indications that the jury relied on the error.

The majority below failed to apply this test. First, the majority did not consider the entire record when assessing the weight of the evidence. And, more importantly, it failed to consider the effect of the error at all. When the proper analysis is applied, the error in this case cannot be considered harmless.

A. When All of The Evidence Is Considered This Was A Close Case.

1. The Majority Considered Factors The Jury Was Instructed Not To Consider.

In harmless-error analysis, it is the jury's opinion of the weight of the evidence that controls, not the reviewing judges'. Thus, it is imperative that

reviewing courts only consider evidence the jury heard and presume that the jury followed the court's instructions.

The majority failed to follow this command when it began its analysis with reference to factors the jury could not have considered. The majority argued that it was important to "look at the big picture," pointing first to the fact that Petitioner's codefendants pleaded guilty. Pet. App. 10A. While that might be a consideration for judges, it is a fact that the jury was instructed to disregard. J.A. 719.

The majority then criticized Petitioner for "elect[ing] to offer something in the nature of an actual affirmative 'defense.'" Pet. App. 11A. The "affirmative 'defense'" was, of course, not an affirmative defense at all, but merely a claim that Petitioner did not commit the crime—a proposition the jury was instructed to presume. J.A. 722. The majority said that this "defense" was harder to prove because Petitioner did not testify. Pet. App. 11A. While such considerations may impact a judge's calculation, juries are instructed that they may draw no inferences whatsoever from the fact that a defendant remains silent. J.A. 722.

The harmless-error inquiry does not ask whether a judge thinks, based on his vast criminal law experience, that the defendant had a "difficult defense to sell."[7] The inquiry asks what weight the jury that heard the case could have assigned the

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[7] In reality, a defendant has no obligation to "sell" a defense. The government bears the burden of proof. The mere assertion that the defendant was not guilty does not shift the burden to the defendant to establish innocence.

evidence. In making this inquiry, reviewing courts presume that the jury followed the instructions. *Yates*, 500 U.S. at 403 (referring to the "sound presumption" that jurors "follow the instructions they are given"). By considering factors no jury could consider when determining the evidence overwhelming, the majority improperly substituted its views for the jury's.

2. The Majority Failed To Consider The Evidence In Context.

The majority acknowledged that the issue of harmlessness was "close." But, it believed that the government's evidence, absent the error, "would have moved the jury to convict [] without a nudge from anything it heard in the government's rebuttal case." Pet. App. 17A. This conclusion was only possible because the majority did not consider the evidence in context. The majority failed to consider any of the evidence Petitioner presented at trial and focused almost exclusively on four pieces of the government's evidence: the phone records, the testimony of Carlos Cruz, the flight evidence, and the prior conviction evidence. The majority described this evidence as if it was uncontroverted. The record tells a different story.

a. The Government's Phone Record Evidence Was Contested.

The government presented a phone summary chart showing calls between Perez and Cruz as well as calls between Perez and Petitioner. With its

summary chart, the government argued that calls between Cruz and Perez were followed by calls from Perez to Petitioner—indicating a direct line of communication from Cruz to Perez to Petitioner. According to the government, this pattern indicated Petitioner's involvement in the negotiations and knowledge about the drug deal. J.A. 632-33.

However, the government's chart was incomplete. Petitioner presented a chart showing that, after receiving calls from Cruz, Perez often called other numbers and did not immediately call Petitioner. J.A. 107-12. The government's chart omitted these calls. Thus, the government's chart could not establish a series of back-to-back calls indicating Petitioner's knowledge. All the charts proved was that Perez called Petitioner (among others) at some point after speaking with Cruz. J.A. 751-57.

Phone records and testimony also demonstrated that Perez and Petitioner were both close friends and family. As such, Perez and Petitioner exchanged telephone calls regularly before Cruz ever contacted Perez about the cocaine. J.A. 104-05, 751-57. The phone charts did not show a change in interaction between Petitioner and Perez after Perez learned about the drug deal. Thus, when viewed in context, the phone records constituted unpersuasive circumstantial evidence that Petitioner knew a drug deal was going to occur.

b. Taken As A Whole, Carlos Cruz's Testimony Hurt The Government's Case.

The majority focused on only one small part of Cruz's testimony—his testimony that Petitioner stated "we got the money." But, the remainder of Cruz's testimony supported the defense's theory that Petitioner was not involved.

Cruz testified that, before meeting Perez, he believed that the drug deal would be between only the informant and Perez. Petitioner was not supposed to be involved. J.A. 242-44. Cruz also testified that no one was supposed to bring money. The meeting's purpose was only to inspect the drugs. J.A. 237-43. As the dissent noted, this evidence cut strongly against the government's claim that Petitioner was involved:

> Vasquez was not recorded at all. He was not even mentioned in any of the recorded calls. The agents, the confidential informant, and even Cruz were expecting only a single customer to show up for the meeting. They knew nothing about Vasquez until they saw him arrive in Perez's car at the nearby Denny's parking lot, from where he could see Perez and Cruz. He never got out of the car, and the agents did not hear him talk with anyone.

Pet. App. 23A.

Cruz only identified one statement suggesting Petitioner knew about the drug deal. Cruz testified that, after he walked to the Bonneville, Perez said,

"tell [the informant] we got the money here." Immediately thereafter, Cruz claimed Petitioner, for some unknown reason, repeated the words: "tell him we got the money here." J.A. 223. The majority treated this statement as "undisputed fact." Pet. App. 24A. But, as the dissent noted, "[the] credibility of that key bit of testimony was subject to strong attacks." *Id.*

"On the witness stand, Cruz admitted having lied to the government about Vasquez and several other subjects." Pet. App. 25A. Specifically, after his arrest, Cruz told agents that he had met Petitioner and Perez before he and Perez drove to Arlington Heights to meet the informant. On the stand he admitted that was a lie. J.A. 294. He further admitted that he lied about Petitioner in an attempt to tell the agents "what they want[ed] to know at that time" and get a lesser sentence. J.A. 255-58. As the dissent noted, "Cruz was a cooperating defendant with powerful incentives to help the government." That powerful incentive was a plea agreement that offered Cruz the opportunity to get below a ten-year mandatory minimum sentence and instead get a recommended sentence of 45 months. J.A. 251-53, 272; See *Fulminante*, 499 U.S. at 300 (considering benefits cooperating witness received in finding that error was harmful).

Cruz also admitted that, before cooperating, he signed an affidavit, swearing that agents never read him Miranda rights before taking his confession. J.A. 273. After deciding to cooperate, he claimed that the agents did read him his rights, but that he did not hear them because he was "looking around." J.A. 274-75. Even the government

acknowledged that these were lies. J.A. 703

But the most damaging attack concerned the very testimony upon which the majority relied. On cross-examination Cruz was confronted with the fact that, despite multiple meetings with agents in the year following his arrest, he never mentioned Petitioner saying, "We've got the money" until a few days before trial. Cruz claimed that he told the agents about this statement "way back" when he pled guilty. J.A. 271-72. The government's own Officer Chupik then testified that the first time Cruz ever mentioned Petitioner's "money" comment was a few days before the trial. J.A. 389. It could not have been lost on the jury that the government's cooperator was impeached by the government's own agent. In the end, the jury likely treated this one bit of testimony "as a late and false invention by Cruz." Pet. App 25A.

c. The Flight Evidence Was Inconclusive Because Petitioner Had Reason To Flee Unrelated To The Charged Offense.

When agents ran toward the Bonneville to make the arrest, Chupik testified that Petitioner put the car in reverse, collided with two police vehicles, put the Bonneville in drive, sped at Chupik, and drove the wrong way down a one-way street. J.A. 73-75. The government argued that this proved Petitioner knew about the drug deal. Otherwise, there was no explanation for the flight. J.A. 639-41.

This Court has cautioned that there is a limit

to the weight that can be given to flight evidence. *Wong Sun v. United States*, 371 U.S. 471, 483 n.10 (1963) ("[W]e have consistently doubted the probative value in criminal trials of [flight evidence]"). This is especially true in cases where the defendant presents evidence showing an independent reason for flight, which had nothing to do with the charged conduct.

Petitioner was on parole. J.A. 127-28. Chupik testified that six armed officers ran toward the Bonneville, some with guns drawn, and one of them physically collided with the vehicle's hood. J.A. 127. To a parolee, the approach of armed officers obviously intending arrest creates an incentive to panic and flee independent of any knowledge about a drug deal. For a parolee, arrest means violation and prison time. Hence, the defense argued that Petitioner had a reason to flee that had nothing to do with Perez's drug deal. J.A. 664-65.

The court instructed the jury that "[i]ntentional flight by a person immediately after a crime has been committed is not sufficient by itself to establish the guilt of that person." J.A. 724. The court went on to instruct the jury that they should consider

> whether the defendant intentionally fled from the law enforcement officers, whether this flight occurred because of conscious guilt or for some other purpose, whether any such guilt came from the crime charged in this case or from some other concern, and whether the flight gives any actual insight into whether the defendant committed the

charged crime.

J.A. 725. There was no dispute that Petitioner fled the scene. But, due to Petitioner's parolee status and the concerns that could create, the jury could have relied on this instruction and determined that the flight did not give "any actual insight into whether Petitioner committed the charged crime."

There was also substantial confusion regarding how the flight occurred. Three witnesses testified regarding the flight from the parking lot, each with a different version of events. These inconsistent accounts, along with vehicle photos showing damage that was inconsistent with government witnesses' descriptions, made the flight evidence appear incoherent and unreliable. J.A. 128-35, 237-40, 342-43, 381-84, 395-98. This permitted defense counsel to forcefully argue that, to keep Perez from fleeing, J.A. 664-69, the police vehicles may have initiated the collision with the Bonneville before it moved at all.

In light of the limited probative value of flight evidence generally, the specific cautionary instruction here, and Petitioner's parolee status, the flight evidence was far from conclusive evidence of guilt.

d. The Prior Conviction Evidence Was Not Persuasive.

The final piece of evidence the majority considered was Petitioner's prior conviction. Government evidence showed that, in 2002, Petitioner was convicted for delivery of a controlled

substance. The conviction involved Petitioner and Perez driving to meet an informant in a vehicle with a trap compartment. J.A. 320-23.

The defense pointed out significant differences between Petitioner's conduct in the six-year-old drug transaction and his conduct in this case. In 2002, Petitioner communicated and met directly with the buyer, personally provided the buyer with cocaine, and personally accepted money. In this case, Perez and Cruz were buying cocaine from an informant. J.A. 321-23. Petitioner never spoke to or met Cruz or the seller and never participated in the negotiation. J.A. 241-49. Consequently, the evidence showed that Petitioner's actions when participating in a prior drug transaction were completely different than his actions in this case. The jury was instructed that it could consider the prior conviction only for a limited purpose—an instruction they are presumed to have followed. J.A. 717. Thus, the prior conviction constituted inconclusive circumstantial evidence.

3. The Majority Did Not Consider Marina Perez's Testimony.

The majority did not compare the four pieces of evidence on which it focused with Marina Perez's testimony, undoubtedly the most important testimony in the trial. Mrs. Perez's "testimony provided an innocent explanation for Vasquez's presence on the scene in the car with the hidden money." Pet. App. 24A. She testified that she was with her husband shopping throughout the morning of August 5 and that Petitioner never had access to Perez's Bonneville during that time. J.A. 426-28.

After shopping, Perez drove the Bonneville to Petitioner's residence so Perez could help Petitioner with his disabled mother. J.A. 428-31. Mrs. Perez testified that, while at Petitioner's residence, Perez told her he was leaving to go out with a friend. She wanted him to stay and they argued. Mrs. Perez testified that her husband asked her to bring his Bonneville and pick him up in Arlington Heights later when he called her. Perez left Petitioner's residence with someone who picked him up around 4:00. J.A. 430-32.

Mrs. Perez testified that she was angry with her husband. So, she asked Petitioner if he would pick Mr. Perez up from Arlington Heights if she agreed to stay with his mother. Petitioner agreed. J.A. 433-35. Mrs. Perez testified that, when Petitioner went out to get in his vehicle to pick Perez up, he found Perez's Bonneville parked behind his garage, blocking Petitioner's vehicle in. After discovering this, Petitioner went back into the house and asked Mrs. Perez to move the Bonneville. She testified that, instead of moving the car, she gave Petitioner the keys and told him to take the Bonneville to Arlington Heights. J.A. 436-37.

This testimony provided an innocent explanation for Petitioner's presence in the Bonneville at the scene of Perez's drug deal. Since he initially tried to take his car and only drove the Bonneville by chance, Petitioner could not have knowingly transported the money in the hidden compartment. Without awareness of the money, there was no evidence of Petitioner's knowledge or agreement.

Subsequent to Mrs. Perez's testimony, the

government requested a one-day continuance to review recorded conversations between Mr. and Mrs. Perez and subpoena her. J.A. 1(Dkt.124), 459-70. The recordings included Mr. and Mrs. Perez recounting various statements Petitioner's attorney allegedly made. J.A. 509-21, 759-78. The court granted this continuance over objection and erroneously admitted the recordings for their truth. J.A. 469, 518, 521. Absent the erroneously-admitted recordings, Mrs. Perez's testimony was unimpeached.[8]

When compared to Mrs. Perez's unimpeached testimony, Cruz's significantly impeached testimony could not shift the evidentiary balance in favor of proof of guilt beyond a reasonable doubt; nor could the inconclusive phone record evidence. Absent the erroneously-admitted recordings, that leaves only the prior bad act evidence and flight evidence to overcome Mrs. Perez's testimony. Since the jury was instructed that flight evidence had to be viewed with caution and prior bad act evidence could only be considered for a limited purpose, it is unreasonable to find that such circumstantial evidence could be called overwhelming when compared to Mrs. Perez's testimony. Indeed, the evidence in this case was close. By failing to consider impact of Mrs. Perez's testimony, the majority violated this Court's requirement that harmless-error analysis involve a consideration of the entire record.

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[8] Whether even the erroneously-admitted recordings actually impeached Mrs. Perez's testimony is unclear. The dissent noted that "nothing in the MCC tapes is inconsistent with her testimony." Pet. App 19A.

4. The Majority Failed To Consider Jury Actions Which Demonstrated That This Was A Close Case.

The jury's actions demonstrated that the government's evidence was not overwhelming. First, the jury deliberated for more than eight hours. J.A. 737, 739, 743. This was a simple, one-transaction drug case. Such a lengthy deliberation is inconsistent with the jury deeming the evidence overwhelming.[9] Additionally, the jury's acquittal on Count Two (attempt) demonstrates that this was a close case. That verdict is hard to reconcile with the jury's conviction on Count One (conspiracy). If Petitioner knew about the drug deal and actively helped Perez provide the money, then Petitioner attempted to possess cocaine. See J.A. 642 (government arguing that "All of the evidence . . .not only does it go to that conspiracy charge . . . it also goes to ... the attempt").

Similarly, if the jury found Cruz's testimony credible, then Petitioner would have been convicted on both counts. Cruz testified that Petitioner said: "*We* have the money." That implicated Petitioner in attempting to possess the cocaine by purchasing it with the money in the Bonneville. Nonetheless, the jury found Petitioner not guilty of attempt. That means that the jury necessarily found Cruz's

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9 See *Parker v. Gladden*, 385 U.S. 363, 365 (1966) (finding length of deliberation showed a difference among jurors as to guilt of defendant); see also *State-of-the-States Survey of Jury Improvement Efforts* (April 2007), National Center for State Courts (average length of jury deliberation is four hours).

testimony about Vasquez's alleged "money" statement, on which the majority relied, incredible. The majority's reliance on testimony that the jury found incredible amounts to improperly supplanting jury findings with the court's opinion.

After a lengthy deliberation, the split-verdict brings with it the indication of a compromise. Pet. App. 27A ("the split-verdict certainly has the whiff of a compromise verdict"). Any case involving a split-verdict that could be interpreted as a compromise is not a case involving overwhelming evidence. This is because, when a jury returns two different verdicts on intricately intertwined charges, it is difficult to say that the evidence is overwhelming as to one but not the other. The majority's final conclusion that the "evidence [] would have moved the jury to convict Vasquez without a nudge from anything it heard in the government's rebuttal case," Pet. App. 17A, indicates that the evidence, which was the same as to both counts, was indisputably overwhelming. The jury obviously did not see it that way in light of its acquittal on attempt. Thus, the majority's harmlessness finding amounts to a rejection of the jury's apparent conclusion that the question of guilt was close.

After removing the erroneously-admitted recordings, a full review of the evidence indicates that, in the eyes of the jury that heard the case, the evidence did not appear overwhelming. Thus, even under the erroneous overwhelming-evidence test, the error was not harmless. Nonetheless, the correct test requires inquiry into the error's impact.

B. The Wrongful Admission Of Petitioner's Attorney's Statements That He Would Lose At Trial And Should Plead Guilty Was Extremely Prejudicial.

The majority did not consider the error's effect at all. But, as the dissent demonstrated and this Court's precedent commands, the prejudicial effect of the error must be considered.

1. The Nature Of The Error Was Inherently Prejudicial

The error here placed in the jury's mind the most devastating of notions—the defendant's own lawyer thinks he is guilty. The jury heard trial counsel's purported statement that Petitioner would lose the case. J.A. 769. The Court admitted it for its truth. That means that the jurors were permitted to conclude that, as a matter of fact, Petitioner should lose the case. Thus, the jury was permitted to convict Petitioner based solely on his attorney's statement. The error "was just about as prejudicial as one could expect to encounter in a trial." Pet. App. 26A.

The district court also admitted for its truth counsel's statement that Petitioner should plead guilty. J.A. 771. If that statement is taken for its truth, then it entails the conclusion that Petitioner is guilty and should have pled that way. This statement, if taken as true, could also provide an independent basis for conviction. It is impossible to prove that no juror based her decision on this statement.

The error here is most similar to an

erroneously-admitted confession made after conferring with counsel. The devastating impact of confession evidence is obvious. *Fulminante*, 499 U.S. at 313 (Kennedy, J. concurring) ("If the jury believes that a defendant has admitted the crime, it doubtless will be tempted to rest its decision on that evidence alone, without careful consideration of the other evidence in the case"). "In terms of prejudice, these harpoons are comparable to evidence of a defendant's own withdrawn guilty plea. Such a plea is virtually never admissible because of its powerful force." Pet. App 27A (citing Fed. R. Evid. 410(1) and *Kercheval v. United Sates*, 274 U.S. 220, 223-224 (1927)).

Additionally, the erroneously-admitted statements indicated that trial counsel believed that Petitioner was guilty. Because these statements were admitted for their truth, the district court's error permitted the jury to conclude that counsel's belief was sincere and correct. Counsel was then forced to argue Petitioner's innocence to a jury that had reason to believe he was being disingenuous when he requested acquittal. Consequently, Petitioner lost the ability to be represented by an effective advocate.

Because the district court's error undermined the credibility of Petitioner's attorney, it is impossible to calculate its impact. Any juror who took the erroneously-admitted statements for their truth, as the jury was permitted to do, would disregard anything trial counsel said in his client's defense including the entire closing argument. When an error deprives a defendant of the opportunity for cross-examination, *Van Arsdall* requires courts to assume that the damaging potential of cross-

examination was fully realized. 475 U.S. at 684. When a defendant is deprived of effective closing argument, a similar assumption is warranted. It is impossible to say, with any degree of assurance, that such a pervasive error did not affect the jury.

2. The Error Related To The Most Important Testimony In The Trial.

The government's reaction illustrates the importance of Mrs. Perez's testimony. First, the government attorney conducting cross-examination requested a continuance to collect her thoughts in the midst of examination. J.A. 445. When that continuance produced ineffectual examination, the government spent three days pouring over recorded calls between Mr. and Mrs. Perez and filed an emergency motion for a day-long continuance. J.A. 459-70. The defendant filed written objections. J.A. 1(Dkt.124). On Monday, the jury was sent home without hearing any evidence because of the government's attempt to admit the recordings. J.A. 473. None of that happens in response to unimportant evidence.

The government also sought admission of the recordings despite potential conflicts of interest they created with Petitioner's attorney. J.A. 478-83, 576-77, thereby risking a mistrial. The government does not risk mistrial for unimportant evidence. Its willingness to take these extreme measures demonstrates that "the government believed that Mrs. Perez had seriously weakened its case and that the improper rebuttal evidence strengthened its case

considerably." Pet. App. 27A-28A.

The events above illustrate that both parties viewed the recordings as vital evidence. There is no basis upon which to believe that the jury found these recordings less important than the parties. Nonetheless, the majority indicated that it understood the evidence better than those who saw it first-hand. The majority found that "the safest course" for the government to take would have been to "let Mrs. Perez leave the stand after a short cross-examination." Pet. App. 11A. The prosecutors participating in the trial obviously disagreed. The majority's suggestion that its view of the evidence was more accurate than that of people that heard it demonstrates its willingness to improperly supplant the jury's view with its own.

3. The Government Emphasized The Error.

Furthermore, the government specifically sought to admit statements attributed to Petitioner's counsel, J.A. 516-22, which indicated (1) that Petitioner would lose the case; J.A. 769, and (2) that counsel advised Petitioner to plead guilty. J.A. 771. Petitioner strenuously objected to these admissions. J.A. 509-21. When the district court erroneously ruled that these statements would be admitted for their truth, defense counsel again objected. J.A. 521. Nonetheless, the government did not request a limiting instruction.

The government also emphasized the erroneously-admitted evidence in front of the jury. First, during its examination of Mrs. Perez,

government counsel asked her if Petitioner's attorney said, "everybody was going to lose." J.A. 533. Government counsel repeated that statement three times. J.A. 533-34. Even after Mrs. Perez left the stand, the recordings remained the focus of the trial. The government called a custodian who admitted the recordings and played them. J.A. 566-573, 585.

Government counsel again drew the jury's attention to these erroneously-admitted recordings during closing argument. J.A. 644-46, 716-18. He referenced those recordings as the evidence that disproved Mrs. Perez and asked the jury to rely on them. J.A. 716-18. Defense counsel strenuously argued that the recordings were meaningless. J.A. 679-90. It is impossible to say with fair assurance that an error, repeatedly emphasized throughout the trial, did not affect the jury.

4. The Jury's Actions Demonstrated The Influence Of The Error.

The erroneously-admitted recordings provided the only evidence the government introduced to discredit Mrs. Perez. Without them, they had no way to effectively disprove Petitioner's innocent explanation for his presence in the Bonneville at the scene. There is no doubt, based on the timing of the government's continuance and the significant amount of time that both parties spent on Mrs. Perez's testimony during arguments, J.A. 644-46, 679-90, 710-18, that her testimony appeared vital to the jurors.

Further, the government presented the

recordings in dramatic fashion immediately following an unexpected day-long continuance. For that reason, the jury likely viewed them with an air of importance.

The jury indisputably proved that Mrs. Perez's testimony was central to the deliberations when it sent a note asking for a transcript of her "testimonies." J.A. 739. Ignoring the jury's explicit focus on the testimony impacted by the error demonstrates that the majority did not even attempt to assess the error's impact on the jury that heard the case. Instead, the court supplanted the jury's focus on Mrs. Perez's testimony with its own willingness to ignore it altogether.

The government presented the recordings as a direct refutation of Mrs. Perez's testimony. J.A. 718. The fact that Petitioner was convicted of conspiracy indicates that Mrs. Perez was not fully believed. The only significant means of attack on Mrs. Perez's credibility came from erroneously-admitted recordings. Therefore, there is a substantial probability that these recordings impacted the verdict.

III. The Majority's Decision Violated The Sixth Amendment.

As discussed *supra*, application of the overwhelming-evidence test violates the Sixth Amendment. When a court relies only on overwhelming evidence, it essentially concedes that error might have affected the verdict. Without considering the error's impact, there can be no assurance that it did not. In this case, the majority

indicated that, whatever the error's effect, the other evidence would establish the defendant's guilt in an error-free trial. This is analytically indistinguishable from the majority reversing the conviction, remanding it for new trial, and then directing a verdict of guilty. Such a course violates the Sixth Amendment right to a jury trial. The Sixth Amendment requires actual trial by jury not imagined trial by judge. Yet, the majority ignored the impact of an error in a close case and hypothesized an error-free trial that resulted in conviction. The mere fact that the majority entered its finding of guilt under the guise of harmless error cannot satisfy the Sixth Amendment's requirements.

CONCLUSION

Petitioner's conviction should be reversed.

Respectfully submitted,

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January 23, 2012

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the U.S. Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Title 28 of the U.S. Code Section 2111 provides:

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

Federal Rule of Criminal Procedure 52(a) provides:

> (a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

RESPONDENT'S BRIEF

No. 11-199

In the Supreme Court of the United States

ALEXANDER VASQUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in its harmless-error analysis by focusing solely on the weight of the properly admitted evidence without considering the potential effect on the jury of evidence that was erroneously admitted for its truth rather than to show the bias and inconsistent statements of a defense witness.

2. Whether the court of appeals' harmless-error analysis violated petitioner's Sixth Amendment right to a jury trial by disregarding the effect of the error on the jury in this case.

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In the Supreme Court of the United States

No. 11-199

ALEXANDER VASQUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1A-28A) is reported at 635 F.3d 889.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 2011. A petition for rehearing was denied on May 10, 2011 (Pet. App. 29A). The petition for a writ of certiorari was filed on August 8, 2011, and was granted on November 28, 2011. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on one count of conspiring to possess with intent to distribute more than 500 grams of cocaine, in

violation of 21 U.S.C. 846. The district court sentenced petitioner to 240 months of imprisonment, to be followed by eight years of supervised release. The court of appeals affirmed. Pet. App. 1A-28A.

1. a. Petitioner and petitioner's cousin, Joel Perez (Perez), were involved in at least two similar drug transactions: one in 2002 and the other, which gave rise to this case, in 2008. In the 2002 transaction, petitioner and Perez drove to a grocery-store parking lot in a suburb of Chicago, Illinois, where they had agreed to meet an individual to sell him cocaine. J.A. 304-307. Petitioner sold the cocaine to the buyer—a government confidential informant—for $4000 in cash, while law-enforcement officers watched. J.A. 305, 308-313. After petitioner and Perez drove away, officers stopped their car and arrested them. J.A. 312-315. A search of the vehicle revealed a hidden compartment in the passenger-side dashboard under the airbag panel, containing more cocaine and an additional $15,000 in cash. J.A. 315-316, 318-319. In 2004, petitioner pleaded guilty to unlawful delivery of a controlled substance. J.A. 320.

b. In August 2008, petitioner and Perez again participated in a drug deal in a Chicago suburb (Arlington Heights), this time with co-defendant Carlos Cruz. Pet. App. 2A-3A. The drug transaction again involved a government informant and again led to the arrest of petitioner and Perez. *Ibid.*

In early August, Perez asked his friend Cruz—who had not met petitioner—for help in locating a source for one kilogram of high-quality cocaine. J.A. 165, 167, 169-171, 240-241. Cruz called some of his contacts, including a government informant (Alex Diaz). J.A. 171. The informant told Cruz that he could secure the cocaine by Sunday or Monday. J.A. 172-173; see J.A. 104, 140.

Cruz called Perez and conveyed that information. J.A. 174-175.

On the afternoon of Monday, August 4, 2008, the informant telephoned Cruz, informing him that the cocaine was ready and that one kilogram would cost $23,000. J.A. 176, 186; see J.A. 37-38, 185-187 (call transcript), 751 (call 1). Cruz telephoned Perez to convey the news. J.A. 188. During that call, the men agreed that they would meet the informant to determine whether he really had pure, high-quality ("fish scale") cocaine and that they would not bring any money to the meeting. J.A. 188-189; see J.A. 175, 194-195. Cruz told Perez that, if the cocaine was good, they would then collect the cash and buy the cocaine. J.A. 189. Telephone call records (J.A. 751-758) show that, after Cruz made those August 4 calls to Perez (at 7:29 p.m. and 7:31 p.m.), petitioner and Perez exchanged eight telephone calls from 8:49 p.m. to 11:03 p.m., separated by several other calls to other numbers. J.A. 751, 754-755 (calls 5-6, 8-15); see J.A. 87-93.

The following day (August 5), petitioner and Perez made at least 27 documented calls to each other before they were arrested shortly after 5:30 p.m. J.A. 751-752. In the morning, the informant telephoned Cruz, prompting a series of calls in which Cruz served as an intermediary between the informant and Perez. J.A. 189-192, 751. Perez asked Cruz whether the informant could "bring the kilo of cocaine to Chicago" but Cruz told him that the informant declined and that they would instead have to travel "out to Arlington Heights." J.A. 191. The response angered Perez, who cancelled the deal. *Ibid.* Perez later reconsidered and told Cruz to pick him up near the intersection of Irving Park Road and Harlem Avenue for the drive to Arlington Heights. J.A. 192-194.

At 3:57 p.m., the informant called Cruz, who explained that he was about to depart to get Perez. J.A. 590-592 (call transcript), 751 (call 49). During a 4:36 p.m. call, Cruz told the informant that he was caught in traffic and was still on his way to Perez. J.A. 593 (call transcript), 752 (call 54). During those calls Cruz explained that he was driving to meet Perez at Irving Park and Harlem and asked the informant for directions from that location to their meeting. J.A. 592-593; see J.A. 193-194. The informant told Cruz to take Harlem to the expressway and then drive to Arlington Heights, where the informant would provide further directions once Cruz exited the freeway. *Id.* at 592-593; cf. App., *infra*, 1a (map). Perez called Cruz at 4:44, 4:50, and 5:03 p.m., before Cruz arrived to pick up Perez. J.A. 194, 714, 752 (calls 55-57). When Perez entered Cruz's truck, he confirmed to Cruz that, as they previously agreed, he did not bring any money and did not "bring [any]body else." J.A. 194-195.

While en route to Arlington Heights, Cruz called the informant at 5:16 p.m., and discussed directions and the quality of the cocaine. J.A. 199-201, 752 (call 59). Cruz also observed Perez on his phone. J.A. 201. Phone records document calls between Perez and petitioner at 5:05, 5:22 and 5:24 p.m. J.A. 752 (calls 58, 60, 62). At 5:24 and 5:25 p.m., Cruz and the informant spoke again as Cruz exited the expressway. J.A. 203, 752 (calls 61 and 63). The informant told Cruz to proceed to the Shell gas station just to the right side of the expressway's exit and to meet him in the gas-station parking lot. J.A. 203; see J.A. 40.

Soon after Cruz and Perez parked in the lot, the informant arrived and parked two spaces away. J.A. 206, 218; see App., *infra*, 3a (photograph showing where the

vehicles parked); see also App., *infra*, 2a, 4a (Shell station aerial- and ground-view photographs); J.A. 40, 43-47, 204 (describing and admitting photographs). Both vehicles were located in parking spots at the north end of the gas-station convenience store in spaces at the westernmost edge of the property, immediately adjacent to the parking lot for a Denny's diner located next door. J.A. 43, 206-207, 218; see App., *infra*, 2a-3a (photographs). The Shell and Denny's parking lots were separated by a row of low bushes interspersed with a few trees. App., *infra*, 2a-3a (photographs); J.A. 44-45, 205-206 (explaining that the bushes were smaller in August 2008 than those in the photographs).

Drug Enforcement Agency (DEA) Special Agent James Chupik had been following the informant's vehicle in an unmarked car and, at approximately 5:28 p.m., he saw the informant enter the Shell property. J.A. 48-50, 123, 142. Phone records show that petitioner again called Perez at 5:29 p.m. J.A. 752 (call 64).

While sitting in his car, the informant told Cruz and Perez that the cocaine was only a few blocks away and that they should follow him to confirm its quality. J.A. 208, 213; see J.A. 41-42, 210-212 (conversation transcript). That parking-lot meeting lasted only two or three minutes. J.A. 142-143. The informant then drove away, Cruz told Perez "let's go," but Perez declined, stated that he had "somebody else to pick [him] up," and walked between the bushes into the Denny's parking lot. J.A. 214.

Meanwhile, petitioner had arrived in a black Pontiac Bonneville and had parked on the easternmost edge of the Denny's parking lot, up against and facing the row of bushes separating the Shell and Denny's lots, with Cruz's car parked just on the other side of the bushes.

J.A. 71, 96, 218; see J.A. 57; p. 5, *supra*; App., *infra*, 2a-3a (photographs). The Bonneville, like the car petitioner had used when he was arrested in 2002, contained a hidden compartment in the passenger-side dashboard under the airbag panel where the airbag should have been, which contained $23,000 in cash, *i.e*, the stated price of the cocaine. J.A. 96-98; see J.A. 37, 176, 186.

Cruz started his car to follow the informant but promptly returned to his parking spot when Perez telephoned and told him to come back. J.A. 215-216, 752 (call 65 at 5:32 p.m.). Cruz then walked through the bushes to the Bonneville, where petitioner was in the driver's seat and Perez was in the front passenger seat with his window down. J.A. 219-220. As Cruz stood at the front passenger side of the car, Perez apologized for not telling Cruz that he had arranged for someone else to pick him up. J.A. 220-221.

Agent Chupik quickly realized that Perez and Cruz did not follow the informant. J.A. 69, 143. The agent called the informant and instructed him to call Cruz to see whether the suspects intended to complete the deal and whether they had brought the money with them. J.A. 69. When the informant called, Perez told Cruz to tell the informant that they did not want to follow the informant and that they "got the money here." J.A. 222-223. Petitioner then repeated, "Tell him we got the money here." J.A. 223.

Cruz conveyed that information to the informant, who agreed to bring the kilogram of cocaine back to the gas station. J.A. 223-224. The three men then waited for about three to five minutes, with petitioner and Perez in the Bonneville and Cruz standing near the Bonneville's front passenger side. J.A. 226, 328. Meanwhile, the informant had contacted his DEA handler,

and law-enforcement officers converged on the Denny's parking lot. J.A. 70-71. Six officers on foot, wearing ballistic vests marked "Police" and "screaming 'police,'" ran into the Denny's lot from the gas station, while at least three unmarked police vehicles with lights blazing entered that lot and moved into position behind the Bonneville. J.A. 53-55, 58, 71-72, 140, 230-232, 329, 331. Cruz immediately surrendered. J.A. 57, 73, 233-234; cf. J.A. 75, 752 (call 67 from informant to Cruz's phone at 5:48 p.m. made after Cruz had been handcuffed). Petitioner did not.

When petitioner saw the advancing officers, he exclaimed "I told you" in Spanish ("te di[j]e") and threw the Bonneville into reverse. J.A. 73, 227-228. Petitioner's car struck the two police vehicles blocking the escape and briefly stopped before petitioner shifted gears and drove the Bonneville forward, striking at least one police vehicle as petitioner fled towards the Denny's exit. J.A. 59, 330-331, 348. Agent Chupik moved into the path of the oncoming Bonneville, pointed his gun at petitioner, and ordered him to stop. J.A. 59, 74, 136-137. Petitioner accelerated towards the exit and the agent was forced to leap out of the way. J.A. 74. Petitioner then raced out of the parking lot, turned west directly into oncoming rush-hour traffic in the east-bound lanes of the adjoining road, and "zigzagg[ed]" at a high rate of speed in and out of traffic until he reached an intersection and moved to the proper lane of travel. J.A. 59-60, 331-332.

Law-enforcement officers pursued petitioner and Perez and, a few minutes later, found the Bonneville abandoned in a Walmart parking lot. J.A. 332, 334-335. A bystander told the officers that he had seen two men run from the car toward a nearby McDonald's. J.A. 339.

An Arlington Heights detective pursued the pair and spotted petitioner through the restaurant's window. J.A. 340-341, 345-346. Petitioner locked eyes with the officer, then turned and ran. J.A. 341, 345, 352. The detective chased the men through the McDonald's kitchen and out the back door. J.A. 342-343, 352-353. Petitioner and Perez then split up and fled in different directions, but both were promptly apprehended. J.A. 343-344, 351, 364-367.

Officers found a cell phone on petitioner and two cell phones on the ground near Perez. J.A. 356-359, 367. Investigating agents used those phones to obtain the call records discussed above, which showed that petitioner and Perez made 27 phone calls to each other on the day of the planned drug deal. J.A. 87-93, 751-752. The call records also showed that each call or series of calls between Perez and Cruz that day was followed by phone calls between Perez and petitioner. J.A. 751-752.

Officers subsequently searched the Bonneville and discovered its hidden compartment with $23,000 in cash. J.A. 96-98. Further investigation determined that petitioner had accompanied Perez in May 2008, when the men inspected the then-for-sale Bonneville and Perez purchased it. J.A. 151-153, 158, 160, 390.

2. A federal grand jury indicted petitioner on one count of conspiring to possess with intent to distribute more than 500 grams of cocaine and one count of attempting to possess with intent to distribute more than 500 grams of cocaine. Pet. App. 4A. Perez and Cruz were also indicted and pleaded guilty. *Id.* at 10A. Petitioner went to trial with the defense theory that he was "an innocent bystander who just happened to be in the wrong place at the wrong time." *Id.* at 11A; see J.A. 23-25.

a. The government countered that defense by presenting the evidence discussed above, including proof of petitioner's prior conviction for the similar 2002 cocaine offense as evidence of petitioner's "knowledge, intent, absence of mistake and modus operandi" under Federal Rule of Evidence 404(b). Pet. App. 7A; J.A. 305-319.

Three of petitioner's adult children and Perez's wife, Marina Perez (Marina), testified during the defense case. They stated that they had never seen petitioner drive Perez's Bonneville and that petitioner owned a Toyota and lived on Mulligan Avenue with his girlfriend, their young son, and petitioner's mother. J.A. 400-401, 408-410, 415-417, 426, 429-430; see J.A. 421 (admitting petitioner's driver's license).

Marina provided the basis for petitioner's argument that he did not know that a drug deal would occur. She testified that she was then pregnant and, after shopping for baby clothes, arrived with Perez at petitioner's home on Mulligan Avenue at around 3:00 or 3:30 p.m. on August 5, 2008. J.A. 426-427, 430, 440-441. She stated that Perez told her that he was going to Arlington Heights with friends; that she argued with Perez because she did not want him to leave; and that Perez left petitioner's home at 4:00 p.m. when an unidentified person picked him up. J.A. 432-438. Marina stated that, before he left, Perez had asked her to pick him up later and drive him back, but that she had asked petitioner to go in her stead. J.A. 432-434. She further stated that petitioner's own car was blocked by Perez's Bonneville, so she told petitioner to drive the Bonneville. J.A. 436-437. Marina testified that petitioner left in the Bonneville at around 5:00 p.m. J.A. 446. Marina also testified that she had met with petitioner's lawyer once before the trial. J.A. 424.

After Marina's testimony, the U.S. Attorney's Office discovered recorded prison-phone conversations between Marina and Perez that undermined Marina's testimony. J.A. 458-462. The district court granted the government a one-day continuance in order to prepare to call Marina (and possibly Perez) in its rebuttal case, finding that the recordings reflected that Marina had a bias and that her bias could be addressed on rebuttal. JA 468-469. The court further held that the four recordings were admissible as extrinsic evidence of Marina's bias and prior inconsistent statements. J.A. 518, 520-521, 523-524, 526-527. The court then granted petitioner's request, under Federal Rule of Evidence 106, that the recordings be played to the jury in their entirety. J.A. 524.

The government called Marina as a rebuttal witness. Marina admitted that she had met with petitioner's counsel several times before the one meeting she had mentioned in her earlier testimony. J.A. 539. She also testified that petitioner's counsel told her that the evidence indicated that her husband, Perez, would be found guilty. J.A. 533-534, 544, 548. She also acknowledged her belief that petitioner's counsel would assist in obtaining a lower sentence for her husband and that counsel wanted Perez to plead guilty in a manner that would "not admit the role of [petitioner]" because petitioner "was going to trial." J.A. 535-538.

b. The government then played to the jury four recordings of prison-phone conversations between Marina and Perez on August 1, 5, 12, and 13, 2009. J.A. 573, 585, J.A. 759-778 (transcripts).

The August 1 recording showed that, based on a conversation with petitioner's counsel (Beau Brindley), Marina told Perez that "Beau is trying to tell me that

you're f---ed" and "is trying to make you look like you're f---ed so he can use this strategy." J.A. 760-761. She stated that petitioner's counsel told her that "his idea" was that "[i]f we talk about this car. Well then you know . . . [petitioner] would be okay." J.A. 766. Marina explained her reaction to that strategy: "I'm like what? [Petitioner] came too! If [Perez] is so much f---ed then so is he." *Ibid.* Marina told Perez that, in her view, petitioner's counsel was "lying to [her]" to get her and Perez to "[d]o whatever he wants." J.A. 767. Marina explained that when she told Perez's own attorney (Frank Lipuma) about her discussion with petitioner's counsel, Lipuma "started cursing [petitioner's counsel]." J.A. 761; see J.A. 497, 558; cf. J.A. 468.

In the August 5 recording, Marina told Perez that petitioner's counsel was "saying that everybody is going to lose" but that what he was saying "does not make sense." J.A. 769. Marina stated that "[h]e's saying whatever he wants to say. I don't believe him." *Ibid.*

In the August 12 recording, Perez told Marina that petitioner had met with his counsel. J.A. 771.

> Marina Perez: So what'd Beau tell [petitioner]? What did Beau tell him?
>
> Joel Perez: A blind plea would be good, then he can guarantee this and that. You know what I mean? Just certain things, you know? I got to explain to you.
>
> Marina Perez: He's telling him about a blind plea also?
>
> Joel Perez: Yeah, he is. I gotta explain to you. You know what I mean. He says, if you want, have his wife talk to me, this or that. I have to explain to you tomorrow.

Ibid. Perez told Marina that petitioner's counsel "is saying that this is what'll be better for me"; confirmed to her that "Beau is talking about less, lesser years," "four at the most"; and added that "[h]e's saying we got to get rid of Lipuma. [Laughs]." J.A. 772, 775 (final brackets in original).

In the August 13 recording, Marina told Perez that she had spoken again with petitioner's counsel and that she understood that he could help Perez secure a sentence lower than Perez's own lawyer had indicated. J.A. 776-777. Perez then asked Marina whether petitioner's counsel was proposing that Perez accept "a blind plea or a plea?" J.A. 777. Marina told Perez that it "has to be a specific plea, but you have to be careful before you sign anything because they'll try to be like, 'it was [petitioner] too.'" *Ibid.* Marina added that petitioner's counsel said "you have to be careful with the written agreement, or whatever it is." *Ibid.*

c. After playing the tapes, the government attempted to call Perez as its final rebuttal witness but was unsuccessful and rested its case. J.A. 594, 624-625.[1]

During jury deliberations, the district court denied a jury request for the transcript of Marina's testimony (J.A. 423-449, 529-558). J.A. 739-742. The jury subsequently found petitioner guilty of conspiracy count but acquitted him of attempt. J.A. 745.

3. The court of appeals affirmed. Pet. App. 1A-17A.

a. As relevant here, the court of appeals rejected petitioner's contention that the four recorded conversations between Marina and Perez were inadmissible for

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[1] The district court ordered Perez to testify after the government granted Perez immunity for his testimony, but Perez refused and was held in contempt. J.A. 489-495, 580-582.

any purpose. Pet. App. 14A-15A. The court held that the recordings were admissible as extrinsic evidence of (1) "Marina's bias and interest in trying to get her husband a lower sentence" and (2) her "prior inconsistent statements" insofar as they were "arguably inconsistent with her story that it was her idea that [petitioner] took the Bonneville on the day of the deal." *Ibid.* The court of appeals concluded, however, that the district court had erred in going further and "admitting the [prison] recordings for their truth." *Id.* at 15A.

The court of appeals nevertheless found the error harmless. Pet. App. 16A. It explained that the government bears the burden of proving that "a reasonable jury would have reached the same verdict without the challenged evidence." *Ibid.* (citing *United States* v. *Williams*, 493 F.3d 763, 766 (7th Cir.), cert. denied, 552 U.S. 984 (2007)). That inquiry, the court observed, considers "whether, in the mind of the average juror, the prosecution's case would have been 'significantly less persuasive' had the improper evidence been excluded." *Ibid.* (quoting *United States* v. *Emerson*, 501 F.3d 804, 813 (7th Cir. 2007)). The court stated that "the issue is close," but it ultimately concluded based on its review of "the evidence as a whole * * * that the error was harmless." *Ibid.*

The court of appeals concluded that petitioner's flight from the police was significant evidence of guilt. Pet. App. 16a. The court recognized that flight evidence "must be viewed with caution," but that "there are degrees of flight" and this case involved "flight in the first degree." *Ibid.* The court noted that petitioner "thr[ew] the Bonneville into reverse, endangering officers"; hit two police vehicles; "gunn[ed] it the wrong way into a roadway"; "ditch[ed] the car a few moments later"; and

"tr[ied] to escape by running through the kitchen and out the back door of a McDonald's." *Ibid.* Other incriminating evidence included: cell-phone records revealing multiple calls between petitioner and Perez "leading up to the aborted deal"; petitioner's statement to Cruz that "we got the money here"; the fact that petitioner was driving the Bonneville with $23,000 in hidden cash; and the "striking similarity" between this case and petitioner's previous drug conviction, which also involved Perez, a cocaine deal, and cash hidden in a secret compartment in a car's passenger-side dashboard. *Id.* at 16A-17A. The court concluded that the evidence in this case "would have moved the jury to convict [petitioner] without a nudge from anything it heard in the government's rebuttal case." *Id.* at 17A.

b. Judge Hamilton dissented. Pet. App. 17A-28A. Judge Hamilton disagreed that the recorded conversations between Marina and Perez were admissible to show bias and prior inconsistent statements. *Id.* at 19A-21A. But even if they were, such that they could have been admitted with "a limiting instruction telling the jury that such damaging evidence should not be considered for the truth of the matters asserted," "no [such] instruction was given." *Id.* at 17A-18A. Judge Hamilton agreed with the court that "the district court erred in admitting the [prison] tapes for the truth," *id.* at 21A, but he concluded that the error was not harmless, *id.* at 21A-28A.

Judge Hamilton stated that the harmless-error inquiry requires a court to determine "'whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" Pet. App. 23A (citation omitted). Judge Hamilton then concluded that the government did not satisfy that standard, be-

cause the case against petitioner was "far from a slam-dunk," *id.* at 25A, and the evidence from the recordings was "just about as prejudicial as one could expect to encounter in a trial," *id.* at 26A. Moreover, Judge Hamilton reasoned, the government had emphasized the rebuttal evidence in its closing, *id.* at 27a, and the jury must have viewed the case as a close one, because it acquitted petitioner on the charge of attempted possession with intent to distribute, *ibid.*

SUMMARY OF ARGUMENT

The court of appeals correctly concluded that the erroneous admission at trial of recordings of prison-phone conversations between Marina and Perez for the truth of the matters asserted was harmless. The court appropriately articulated the harmless-error standard and correctly concluded based on its review of the "evidence as a whole" that the non-constitutional trial error did not alter the verdict.

The harmless-error doctrine recognizes that virtually all trials have errors, and it properly avoids unjustifiably imposing the significant social cost of unnecessary retrial by focusing on the trial's underlying fairness and determining whether the error at issue likely altered the trial's outcome. The appellate court's task of separating harmful from harmless errors embodies three basic elements. First, the conclusion of harmlessness must reflect an approriate level of confidence: a "fair assurance" that a non-constitutional error did not have a "substantial and injurious" effect on the verdict, or confidence beyond a reasonable doubt that a constitutional error ultimately did not change the outcome. Second, the court's analysis is an objective one, which does not attempt a subjective inquiry into the minds of jurors to

discern the actual (but unknowable) subjective deliberative processes underlying the verdict. And third, that objective analysis considers the record as a whole in light of the instructions given to the jury, assumes that the jury was a rational one, and weighs the probative force of the evidence that the jury *presumably* considered against the likely probative force of the error. If the government's case is sufficiently strong to give a fair assurance (for non-constitutional error) or confidence beyond a reasonable doubt (for constitutional error) that the jury's verdict would not have been different absent the error, the error is harmless.

The court of appeals followed that process here. It explained that it reviewed "the evidence as a whole," determined that "a reasonable jury would have reached the same verdict without the challenged evidence," and explained that nothing the jury "heard in the government's rebuttal case" would have "nudge[d]" the jury to convict. Pet. App. 16A-17A. The court's opinion reflects that it employed the approriate analysis.

Petitioner's contention that a court must consider the impact of the error on the verdict does not undermine that conclusion. When the government's case is sufficiently strong, a court can find that the error would not have affected the outcome. Petitioner claims that his Sixth Amendment jury-trial right was violated by the court of appeals' analysis. But the court's evaluation of the evidentiary record as a whole to determine to an appropriate degree of confidence that the trial error was harmless is nothing but a "typical appellate-court" process for deciding whether the *remedy* of retrial is warranted for the error. In finding the error harmless, the court did not adjudge petitioner guilty. The jury did so,

and its verdict of guilty beyond a reasonable doubt is the foundation upon which petitioner's conviction rests.

Finally, this Court normally does not conduct fact-bound review of harmless-error claims and it need not do so here, given that the court of appeals explained that it has already reviewed the "evidence as a whole." In any event, the evidentiary record viewed objectively shows that the government's case was quite strong, petitioner's defense was exceedingly weak, and the prejudicial effect of a brief reference to any purportedly harmful statement in the substantial trial record was itself negligible. There is at least a "fair assurance" based on that record that the error did not have a "substantial and injurious" effect on the verdict. That is, the error here was harmless.

ARGUMENT

THE ERRONEOUS ADMISSION OF EVIDENCE IN THIS CASE WAS HARMLESS BECAUSE IT HAD NO EFFECT ON THE OUTCOME

Harmless-error doctrine "focus[es] on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." *Delaware* v. *Van Arsdall*, 475 U.S. 673, 681 (1986). This ensures that the "substantial social costs" that result from reversal of criminal verdicts will not be imposed unjustifiedly. *United States* v. *Mechanik*, 475 U.S. 66, 72 (1986). Retrials demand substantial "resources to repeat a trial that has already once taken place"; impose significant burdens on crime victims; and ultimately can "cost society the right to punish" the guilty when the "[p]assage of time, erosion of memory, and dispersion of witnesses * * * render[s] retrial difficult" or "impossible." *Ibid.* (citations omitted). The harmless-error rule ensures that

those significant costs are not imposed "when an error has had no effect on the outcome of the trial." *Ibid.* In this case, the court of appeals properly held based on the entire record of the case, that the evidentiary error at issue was harmless. That holding is entirely consistent with the Sixth Amendment jury trial right.

A. The Court Of Appeals Employed The Correct Harmless-Error Standard

Rule 52(a) of the Federal Rules of Criminal Procedure provides that "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." See also 28 U.S.C. 2111 ("On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."). The requirement that errors must "affect substantial rights" to warrant reversal requires, outside of the narrow category of "structural errors," see *Neder* v. *United States*, 527 U.S. 1, 7-8 (1999), that courts conduct an "analysis of the district court record * * * to determine whether the error was prejudicial," *i.e.*, whether it "affected the outcome of the district court proceedings." *United States* v. *Olano*, 507 U.S. 725, 734 (1993) (discussing Rule 52(a)).

That emphasis on the outcome of the criminal trial reflects the underlying function of the harmless-error inquiry. This Court has long recognized that "given the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial." *United States* v. *Lane*, 474 U.S. 438, 445 (1986) (quoting *United States* v. *Hasting*,

461 U.S. 499, 508 (1983)). The harmless-error doctrine "recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, . . . and promotes public respect for the criminal process by focusing on the underlying fairness of the trial." *Neder*, 527 U.S. at 18 (quoting *Van Arsdall*, 475 U.S. at 681); accord *Satterwhite* v. *Texas*, 486 U.S. 249, 256 (1988); *Rose* v. *Clark*, 478 U.S. 570, 577 (1986). Those principles require an objective inquiry based on the record as a whole.

1. Harmless-error analysis applies an objective inquiry based on the evidentiary record as a whole that compares the probative effect of properly considered evidence against the probable impact of the error

Because the harmless-error inquiry is designed to separate errors that mattered from errors that do not justify the high costs of a retrial, the task of an appellate court is to review the record to assess an error's likely effect on the outcome of a trial. An appellate court cannot conduct a pristine laboratory experiment to control for the presence of error. Nor can it probe the minds of jurors to discern what outcome they would hypothesize absent the error. Rather, "in typical appellate-court fashion," *Neder*, 527 U.S. at 19, appellate courts review the record to form a judgment whether, absent the error, the ultimate outcome likely would have been the same.

a. The judgment demanded by the harmless-error doctrine embodies three core elements. First, the type of error—constitutional error or not—defines the degree of confidence that a reviewing court must have in its judgment that the error was harmless. Second, the court's judgment of harmlessness must rest on an objec-

tive analysis of the likely effect on a reasonable jury, not on what may have been the (unknowable) subjective rationale of the actual jurors in a case. And third, the inquiry evaluates harmlessness by considering the entire evidentiary record properly before the jury against the probable effect of the error to determine the likelihood that the error did not alter the ultimate outcome of trial.

i. The level of confidence necessary to find that an error is harmless varies with the type of error at issue. For non-constitutional errors, this Court has held that an error is harmless if there is a "fair assurance" that the error did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Kotteakos* v. *United States*, 328 U.S. 750, 765, 776 (1946). When errors of a constitutional dimension are raised on direct review, the test calls for a greater degree of confidence. Such errors are harmless only when it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman* v. *California*, 386 U.S. 18, 24 (1967); cf. *Brecht* v. *Abrahamson*, 507 U.S. 619, 623 (1993) (applying *Kotteakos*' harmless-error standard for constitutional errors raised during habeas review). But "absolute certainty" is never required, nor could it be in any pragmatic system of justice. See *Hedgpeth* v. *Pulido*, 555 U.S. 57, 62 (2008) (per curiam).

ii. In assessing the likelihood that an error was harmless, courts employ an objective standard that considers the effect of the error on an average, reasonable jury. This Court's modern harmless-error jurisprudence recognizes that a reviewing court's evaluation of harmlessness requires consideration of the impact of the error on the jury's verdict "in relation to all else that

happened." *Kotteakos*, 328 U.S. at 764.[2] The court's function is not "to determine guilt or innocence" afresh, *id.* at 763, but to consider the probable impact of an error (if any) on a verdict delivered by jurors who are "not [to] be regarded generally as acting without reason," *id.* at 764. In making that determination, however, the court cannot inquire into the actual deliberative process that led to the verdict, see Fed. R. Evid. 606(b), and is unable to rely on knowledge of the actual "jurors who sat." *Harrington* v. *California*, 395 U.S. 250, 254 (1969). The harmless-error analysis thus is not "a subjective enquiry into the jurors' minds." *Yates* v. *Evatt*, 500 U.S. 391, 404 (1991).

Instead, a reviewing court must base its "judgment * * * on [its] own reading of the record and on what seems to [the court] to have been the *probable impact* of the [error] on the minds of an *average* jury." *Harrington*, 395 U.S. at 254 (emphases added) (finding harmless the constitutionally erroneous admission of codefendants' confessions). That objective standard seeks out a "rational explanation for the jury's verdict, completely consistent with the judge's instructions," and does not "indulge assumptions of irrational jury behavior." *Schneble* v. *Florida*, 405 U.S. 427, 432 (1972) (fol-

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[2] Petitioner relies (Br. 12-15) on several decisions that predate the Court's modern harmless-error jurisprudence. For example, *Weiler* v. *United States*, 323 U.S. 606, 609-611 (1945), concluded that the failure to instruct the jury that it must find at least one witness and corroborating evidence to convict the defendant on a perjury count was not a harmless "'technical' error." That failure to instruct on a necessary finding for conviction would now be an instructional error subject to harmless-error review. See *Neder*, 527 U.S. at 11-13 (holding that a constitutional instructional error that entirely omits an element of the offense is subject to harmless-error review even though it "prevent[ed] the jury from making a finding on the element").

lowing *Harrington* and finding harmless a similar challenge to the admission of a co-defendant's confession).[3]

Accordingly, review for harmlessness is not "based on the fiction" that a court will determine that "the jury *in fact* did not have [the object of the error] in mind when it concluded that the defendant" was guilty; nor does it suggest that "the reviewing court can retrace the jury's deliberative processes." *Pope* v. *Illinois*, 481 U.S. 497, 503 n.6 (1987). The harmless-error doctrine accepts that the relevant error—*e.g.*, the "mistaken admission of evidence," a prosecutorial "comment on a defendant's silence," or the "erroneous limitation of a defendant's cross-examination"—may, in fact, have "alter[ed] the terms under which the jury considered the defendant's guilt or innocence" and therefore at least "theoretically impair[ed] the defendant's interest in having a jury decide his case." *Rose*, 478 U.S. at 582 n.11. But the question on review is whether the remedy of a new trial is warranted for "a trial error that, in theory, may have *altered the basis* on which the jury decided the case, but in practice clearly had no *effect on the outcome*?" *Ibid.* (emphases added). To answer that question, a court must determine whether "a *rational* jury would have found the defendant guilty absent the error." *Neder*, 527 U.S. at 18 (emphasis added).

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[3] Petitioner incorrectly contends (Br. 25) that *Satterwhite* rejected a harmless-error inquiry that focused on "the minds of an average jury." *Satterwhite* held that the state court erred, not because it used the phrase "the minds of an average jury," but because it had mistakenly focused on whether "the legally admitted evidence was sufficient to support [a] death sentence" instead of deciding whether the error was harmless beyond a reasonable doubt under *Chapman*. See *id.* at 258-259.

iii. The objective nature of the inquiry defines the methodology that courts apply to evaluate harmlessness. "Since [the harmlessness] enquiry cannot be a subjective one into the jurors' minds, a court must approach it by asking whether the force of the evidence *presumably* considered by the jury in accordance with the [jury] instructions" is sufficient to show that the verdict "would have been the same in the absence of the [error]." *Yates*, 500 U.S. at 404-405 (emphasis added). If the error is of constitutional proportions, *Chapman* requires that the presumptively considered evidence be "so overwhelming as to leave it beyond a reasonable doubt that the verdict resting on that evidence would have been the same in the absence of the [error]." *Ibid.* (applying *Chapman* standard). But where, as here, nonconstitutional error is asserted, the presumptively considered evidence need only be sufficiently strong to give a reviewing court a "fair assurance" that the error did not exert a "substantial and injurious effect or influence" on the ultimate verdict of guilt. *Kotteakos*, 328 U.S. at 765, 776.

As the Court explained in *Yates* when evaluating the harmlessness of a jury instruction that allowed the jury to rely on an unconstitutional presumption, the harmlessness inquiry involves a two-step analysis. First, the court "ask[s] what evidence the jury considered as tending to prove or disprove" guilt, by examining the "entire record" with the "assumption * * * that the jury considered all the evidence bearing on the issue." *Yates*, 500 U.S. at 404-405; see *Lane*, 474 U.S. at 448 n.11 (*Kotteakos'* harmlessness inquiry "requires a review of the entire record"). Again, that objective question does not involve "a subjective enquiry into the jurors' minds" but rather depends on an "analysis of the instructions

given to the jurors" and the "application of that customary presumption that jurors follow instructions." *Yates*, 500 U.S. at 404. Second, the court "weigh[s] the probative force of that evidence" presumptively considered against "the probative force of the [error] standing alone." *Ibid.* If "the force of the evidence presumably considered by the jury in accordance with the instructions" provides a sufficient likelihood that the result "would have been the same in the absence of the [error]," *id.* at 405, the error is harmless. In other words, an error is harmless when it is sufficiently "unimportant in relation to everything else the jury considered" in the record, *id.* at 403, that the outcome of a rational jury's consideration would likely have been the same.

b. Petitioner contends (Br. 15-18, 27-32) that the proper focus of the harmless-error inquiry is "on the error's effect on the jury that heard the case," Br. 17, as reflected in decisions like *Chapman*, which discuss whether an error "possibly influenced the jury" or "contributed to the conviction," *Chapman*, 386 U.S. at 23-24 (citation omitted). But to the extent he suggests that an error is harmful if it affected the subjective decision process of the "jury that heard the case," his view cannot be squared with this Court's objective approach to harmlessness. *Yates* specifically addressed the *Chapman* standard and emphasized that "[t]o say that an error did not 'contribute' to the ensuing verdict [under *Chapman*] is not, of course, to say that the jury was totally unaware of that feature of the trial later held to have been erroneous." 500 U.S. at 403. Instead, it is "to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." *Ibid.* And that assessment of harmlessness turns not on "a subjective enquiry into the

jurors' minds" but on an evaluation of "the force of the evidence presumably considered by the jury," based on the court's "review of the entire record," the jury instructions, and the "presumption that jurors follow instructions." *Id.* at 404-405.

Petitioner similarly relies (Br. 26-33) on decisions that have found certain instructional errors to violate the right to a jury trial, arguing that they suggest that an error is harmful when it influences or affects the verdict. But the decisions on which he relies reinforce the conclusion that the objective analysis discussed above is the proper inquiry. *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993), for instance, held that a defective reasonable-doubt instruction was a structural error that was *not* subject to harmless-error analysis because it "vitiates *all* the jury's findings" such that there "has been no jury verdict within the meaning of the Sixth Amendment." *Id.* at 280-281. That rationale does not apply to cases where a jury *does* render a verdict of guilty beyond a reasonable doubt, even where an instructional error may prevent it from deciding one element of the offense. See *Neder*, 527 U.S. at 13, 17 (rejecting similar reliance on *Sullivan*); *Washington* v. *Recuenco*, 548 U.S. 212, 222 n.4 (2006) ("We recognized in *Neder* * * * that a broad interpretation of our language from *Sullivan* is inconsistent with our case law.").

Although an instructional error that prevents the jury from rendering a verdict on an element of the offense will "infringe upon the jury's factfinding role and affect the jury's deliberative process in ways" that are normally "not readily calculable," that error will nevertheless be harmless beyond a reasonable doubt under *Chapman* if the missing element was established with

uncontroverted evidence. *Neder*, 527 U.S. at 18.[4] That evaluation of the likelihood that a "rational jury would have found the defendant guilty absent the error," *Neder* explains, does not place the reviewing court in the role of jury but instead requires, "in typical appellate-court fashion," an examination of the record to determine beyond a reasonable doubt that the error did not affect the outcome. *Id.* at 18-19. *Neder*, of course, does not address the *Kotteakos* standard for non-constitutional errors like the one at issue here.[5]

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[4] In some contexts, a guilty verdict itself provides sufficient evidence that an instructional error is harmless beyond a reasonable doubt. For instance, if a jury is erroneously instructed on the elements of an offense, that error does not have affected the outcome if, under the instructions actually given to the jury, the jury's verdict was necessarily based on findings that cover the elements missing from the instruction. See *Carella* v. *California*, 491 U.S. 263, 266 (1989) (per curiam). Many courts of appeals so hold. See, *e.g.*, *United States* v. *Brown*, 161 F.3d 256, 258 n.4, 259 (5th Cir.) (en banc) (erroneous jury instruction on "use" of a firearm was harmless because the jury necessarily found that the defendant "carried" the firearm in violation of 18 U.S.C. 924(c)). Petitioner (Br. 29) concedes this point.

[5] Petitioner appears to contend (Br. 27, 29-31) that *Neder* suggests that trial evidence must be "uncontroverted and incontrovertible" before an error may be found harmless based on the overall strength of that evidence. That suggestion is incorrect. *Neder* applied *Chapman*'s harmless-beyond-a-reasonable-doubt standard because the error in *Neder* (the failure to instruct the jury on an element of an offense) was a constitutional error. *Neder*, 527 U.S. at 4, 18. In that context, the Court it was sufficient (but not necessary) under *Chapman* to show the omitted element was supported by uncontroverted evidence. *Id.* at 18-19. That holding does not suggest a more general requirement that evidence be uncontroverted. Indeed, this Court has found errors to be harmless in contexts where the evidence of guilt was in fact controverted. See, *e.g.*, *Brecht*, 507 U.S. at 624, 639; *Hasting*, 461 U.S. at 511-512. That only makes sense. Cases that go to trial are nearly always controverted through cross-examination or the presentation of a de-

c. The specifics of harmlessness review may vary depending on the nature of the error at issue, but this Court has applied the same basic mode of analysis in various harmless-error contexts, including when reviewing the erroneous admission of evidence.

In *Harrington*, for example, the court reviewed under *Chapman* a first-degree-murder conviction in which confessions from two of Harrington's non-testifying codefendants were unconstitutionally admitted in violation of *Bruton* v. *United States*, 391 U.S. 123 (1968). See *Harrington*, 395 U.S. at 252-253. The Court, based on its "own reading of the record" and assessment of the "probable impact of the two confessions on the minds of an average jury," found the error harmless because "apart from [those confessions] the case against Harrington was so overwhelming that * * * th[e] violation of *Bruton* was harmless beyond a reasonable doubt." *Id.* at 254; see also *Schneble*, 405 U.S. at 430-431 (finding assumed *Bruton* error harmless under *Chapman* where "the independent evidence of guilt" was "overwhelming" and the "prejudicial effect of the codefendant's admission [sufficiently] insignificant by comparison"); *Brown* v. *United States*, 411 U.S. 223, 231 (1973) (finding assumed *Bruton* error harmless in light of "overwhelming and largely uncontroverted evidence properly before the jury").[6]

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fense case or both. If uncontroverted evidence were always required, exceedingly few errors would be harmless.

[6] The Court in *Brecht* found the *Kotteakos* harmlessness standard to be "clear[ly]" satisfied where the State's evidence of guilt was "certainly weighty," petitioner's claim that he accidentally shot the victim was sufficiently undermined by the State's other evidence, and the State's improper references to *Brecht*'s post-Miranda silence covered less than two pages of a 900-page trial transcript. 507 U.S. at 638-639.

Similarly, in *Milton* v. *Wainwright*, 407 U.S. 371, 372 (1972), Milton argued on federal collateral review of his first-degree-murder conviction that his confession was involuntary and erroneously admitted at trial. The Court declined to reach the merits because it found "overwhelming evidence of guilt fairly established in the state court * * * by use of evidence not challenged here," rendering any error "harmless." *Id.* at 377-378. See also *James* v. *Illinois*, 493 U.S. 307, 330 (1990) (Kennedy, J., dissenting) (concluding that admission of illegally obtained statements from the defendant was harmless, given the "overwhelming evidence of [his] guilt in this case, including the testimony of five eyewitnesses").

And in *Arizona* v. *Fulminante*, 499 U.S. 279, 306 (1991), the Court concluded that an erroneously admitted confession was not harmless under *Chapman*, based on its assessment of the strength of the government's case. The Court found that the jury's consideration of the defendant's properly admitted second confession "could easily have depended" on the corroborating fact of the inadmissible confession and that, apart from the confessions, the prosecution's evidence was likely "insufficient to convict." *Id.* at 297-299; see *Premo* v. *Moore*, 131 S. Ct. 733, 744 (2011) ("*Fulminante* found that an improperly admitted confession was not harmless * * * because the remaining evidence against the defendant was weak").

The Court has also focused on the overall strength of the prosecution's evidence when assessing other types of error for harmlessness. In *Hasting*, for example, the Court held that the prosecutor's improper reference to the defendant's failure to rebut the government's evidence was harmless "[i]n the face of th[e] overwhelming

evidence of guilt and the inconsistency of the scanty evidence tendered by the defendants." 461 U.S. at 512. See also *United States* v. *Young*, 470 U.S. 1, 19 (1985) ("the overwhelming evidence of respondent's intent to defraud * * * eliminates any lingering doubt that the prosecutor's remarks unfairly prejudiced the jury's deliberations"). And in *Lane*, where the defendants claimed that certain charges were misjoined for trial in violation of Fed. R. Crim. P. 8(b), the Court found any misjoinder to be harmless "[i]n the face of [the] overwhelming evidence of guilt shown here." 474 U.S. at 450.

Although the Court's analysis often has not focused exclusively on the overall strength of the government's proof, its decisions demonstrate that a court's determination of harmlessness can properly rest on the conclusion that the admissible evidence of guilt is sufficiently strong, such that the prejudicial effect of erroneously admitted evidence can be deemed not to have altered the outcome.[7]

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[7] In contexts where a trial error *prevents* the defendant from presenting evidence to the jury, determining whether the jury's verdict would likely have been the same absent that error requires an assessment of the likelihood that the omitted evidence would have altered the verdict. Thus, in *Van Arsdall*, the Court concluded that a Confrontation Clause error limiting the defendant's ability to cross-examine a government witness could be harmless under *Chapman* if, assuming the "damaging potential of the cross-examination were fully realized," a court can determine the error was harmless beyond a reasonable doubt. 475 U.S. at 684. A reviewing court's analysis in this context may evaluate the "importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permit-

2. The court of appeals stated the correct standard

The court of appeals stated the correct standard of harmlessness in this case. The court explained that its inquiry asked whether "a reasonable jury would have reached the same verdict without the challenged evidence" and was based on its review of "the evidence as a whole." Pet. App. 16A (citation omitted). That statement properly reflects an objective inquiry that accounts for the likely effect of the error in light of the entire evidentiary record. The court's statement that the trial evidence "would have moved the jury to convict [petitioner] without a nudge from anything it heard in the government's rebuttal case," *id.* at 17A, reflects the court's conclusion that the erroneous admission during the government's rebuttal case of taped prison-phone conversations between Marina and Perez for the truth of the matters asserted did not affect the verdict. In short, a reasonable jury would not have been "nudge[d]" by that error to convict petitioner.

Although the court of appeals did not articulate the specific rationale for its view that the erroneously admitted evidence that the jury "heard in the government's rebuttal case" did not alter the jury verdict, that economical approach to the fact-bound portion of its harmless-error analysis is not uncommon in the courts of appeals. Cf. Cert. Reply 3-4 (discussing opinions resolving harmless-error questions "in a few short sentences"). Federal courts may issue judgments without opinions, and this Court has never imposed a general requirement that federal courts electing to issue an opinion must provide lengthy explanations for such mat-

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ted, and, of course, the overall strength of the prosecution's case." *Ibid.*; see *Olden* v. *Kentucky*, 488 U.S. 227, 232-233 (1988) (per curiam).

ters. See *Jones* v. *United States*, 527 U.S. 373, 404 (1999) (noting that a "detailed explanation" of a federal court's harmless-error analysis may not be necessary); *Sochor* v. *Florida*, 504 U.S. 527, 540 (1992) (concluding that state courts need not use "a particular formulaic indication" before their harmless-error decisions will pass scrutiny; suggesting that a "plain statement that the judgment survives" the lower court's harmless-error review would be sufficient).

Petitioner contends (Br. 12, 25-26 & n.5) that the court of appeals erred by concluding that "an average jury would still have found the defendant guilty" after it "stripped the error from the trial" and that the court "in effect" used an "'overwhelming-evidence' test" that did not consider the effect of the error on the jury. But petitioner's reading of the court's decision does not account for the court's express assurance that it "look[ed] at the evidence *as a whole*" (not just that evidence minus the material in question) to determine that "the error was harmless" or for the court's conclusion that the jury still would have convicted petitioner "without a nudge from anything it heard in the government's rebuttal case." Pet. App. 16A-17A (emphasis added).

3. Inferences drawn from jury conduct are unreliable grounds for evaluating harmlessness

Petitioner contends (Br. 56-57, 63) that the Court's harmless-error analysis in this case should be based on inferences that petitioner draws from actions taken by the jury. Specially, petitioner argues that (1) the jury's mid-deliberations request for a transcript of Marina's testimony, (2) the length of the jury's deliberations, and (3) the jury's verdict of acquittal on the attempt count each indicate that *this* jury might have reached a differ-

ent result on the count of conviction absent the district court's evidentiary error. Inferences drawn from such juror conduct are highly unreliable indications of the actual effect of a trial error. Indeed, petitioner's own claims illustrate the hazards of relying on such purported indications of harmful error.

The Federal Rules of Evidence preclude the use of direct evidence of a trial error's effect (if any) on jury deliberations. Rule 606(b) excludes from evidence any testimony from a juror about "any juror's mental processes concerning the verdict" or "the *effect of anything* on that juror's or another juror's vote" (emphasis added). That rule embodies "long-recognized and very substantial concerns" warranting "the protection of jury deliberations from intrusive inquiry," even though there is "little doubt" that at least some verdicts may be "reached after irresponsible or improper juror behavior." *Tanner* v. *United States*, 483 U.S. 107, 120, 127 (1987). Because "[t]he jury's deliberations are secret and not subject to outside examination," this Court has recognized that it would be mere "conjecture" to ascribe a basis for jurors' actual votes on the basis of "speculation into what transpired in the jury room." *Yeager* v. *United States*, 129 S. Ct. 2360, 2368 (2009).

Although certain jury actions can be observed outside the jury room, those actions are normally an unreliable indication of the jury's deliberative process. A jury's request to hear certain testimony, the length of its deliberations, and the divided nature of a particular verdict say little about the strength of the government's case or the impact of particular evidence. Individual jurors may idiosyncratically give undue weight to certain aspects of the trial, only to be persuaded by fellow jurors to see the case in a different light. The very

premise of an *Allen* charge is that a dissenting juror's own assessment of a case may not be "a reasonable one" and may change with further deliberations and exchange of views. *Allen* v. *United States*, 164 U.S. 492, 501 (1896). Or a jury may arrive at a mixed verdict of acquittals and convictions through "mistake, compromise, or lenity." *United States* v. *Powell*, 469 U.S. 57, 65 (1984). Speculation about the reason is often fruitless. Such unreliable bases for inferring whether a trial error affected a jury's deliberative process thus provides at best an exceedingly tenuous basis for harmless-error analysis.

Petitioner's claims illustrate this point. First, petitioner notes (Br. 63) that the jury requested a transcript of Marina Perez's testimony (in the defense and rebuttal cases). J.A. 739. The jury's note may have reflected the request of only one juror, and it may have been prompted by any number of reasons. In this case, Marina's testimony was the sole basis of petitioner's defense that he was an innocent bystander. It is therefore unremarkable that a jury might have wanted to review her testimony before rendering its verdict. Moreover, although petitioner claims that the erroneous admission of hearsay evidence about two statements by his counsel was harmful (Br. 58), Marina's testimony did not focus on either: She admitted that *she* might have said that "everyone is in the s--- hole," J.A. 534, and she denied saying that counsel thought that petitioner "was going to lose," *ibid.* The note thus provides no reliable basis from which to infer harmful error.

Petitioner argues (Br. 56) for the first time that the court of appeals improperly overlooked the length of the jury's deliberations—eight hours—as a factor bearing on the harmless-error analysis. Petitioner suggests (Br.

56 n.9) that the average length of jury deliberation in a federal criminal trial is about four hours, but, in the year petitioner's trial was held, 61% of all criminal trials tried by federal district courts that resulted in verdicts or judgments were completed within three days. Administrative Office of the United States Courts, *2009 Annual Report of the Director: Judicial Business of the United States Courts* 386 (2010) (Table T-2). Petitioner's trial, by contrast, lasted six business days (excluding the one-day continuance), and eight hours of jury deliberation does not seem remarkable given the trial's length and the nature of the evidence. The jurors, for instance, had pages of detailed call records in evidence that they could map against the trial testimony. J.A. 751-758. In fact, the jury requested (and obtained) a dry-erase board with markers to use in the jury room, J.A. 736-737, suggesting a detailed review of the evidence. But more fundamentally, it is impossible to determine what issues took more deliberation than others. The jury may have agreed to convict on the conspiracy count within a few hours but then took longer to decide to acquit on the attempt count. Of course, any such guesswork is, like the inferences petitioner would draw, based on nothing but sheer speculation.

Finally, petitioner notes that the jury rendered a split verdict. In some contexts, a mixed verdict following an error might suggest that the error was harmless. See, *e.g.*, *Young*, 470 U.S. at 18 n.15 (finding prosecutorial comment to be nonprejudicial in part because the jury acquitted on the most serious charge, suggesting that the error "did not undermine the jury's ability to view the evidence independently and fairly"). But here, no reliable basis supports the conclusion that the verdict

of acquittal on the attempt count reflected an overall weakness of the government's case.

The most likely explanation for the split verdict is that the jury believed that the evidence established beyond a reasonable doubt that petitioner had conspired to engage in the cocaine transaction but did not believe that, under the jury instructions it was given for attempt, petitioner had completed a "substantial step" toward possessing the cocaine. J.A. 730 (instruction). The trial judge never defined "substantial," and the jury may well have concluded that the fact that petitioner simply drove to a drug deal, where he sat in the Bonneville and had no contact with the informant, did not constitute a "substantial" enough step where no drugs or money were ever displayed, Perez and Cruz declined to follow the informant to inspect the drugs, and the deal failed to proceed beyond a quick meeting in which only Cruz and Perez briefly spoke to the informant. As the Court explained in *Schneble*, "[j]udicious application of the harmless-error rule does not require that [the Court] indulge assumptions of irrational jury behavior when a perfectly rational explanation for the jury's verdict, completely consistent with the judge's instructions, stares [the Court] in the face." 405 U.S. at 431-432. Given the insubstantial nature of petitioner's assertions, the court of appeals could reasonably have deemed it unnecessary to address them in its opinion.

B. The Court Of Appeals' Decision Does Not Violate The Sixth Amendment

Petitioner contends (Br. 33-43, 63-64) that the court of appeals' harmless-error analysis violated his Sixth Amendment right to a jury trial by focusing exclusively on the strength of the untainted evidence without con-

sidering whether the error had any effect on the jury's verdict. That claim fails on two grounds. First, as explained, the court of appeals' opinion reflects its conclusion that the evidence of guilt was sufficiently weighty that the effect of the district court's evidentiary error would not have altered the verdict. See pp. 30-31, *supra*. Second, and more fundamentally, petitioner is incorrect that harmless-error analysis violates the Sixth Amendment by depriving him of his right to a jury trial.

Petitioner unquestionably had a Sixth Amendment right to a jury trial, and "the determination of guilt or innocence * * * is for the jury rather than the court." *Rose*, 478 U.S. at 582 n.11. But petitioner *was* convicted by a jury that found him guilty beyond a reasonable doubt in an adversarial trial where petitioner was represented by counsel. Petitioner's conviction thus rests on a jury verdict. "Harmless-error analysis addresses a different question: what is to be done about a trial error that, in theory, may have altered the basis on which the jury decided the case, but in practice clearly had no effect on the outcome?" *Ibid.* In other words, should a reviewing court *set aside* the jury's verdict and order a retrial as a remedy? That inquiry does not violate the Sixth Amendment.

Petitioner relies heavily on the Court's decision in *Sullivan*. Br. 40-42. But, as discussed above, *Sullivan* involved a structural error—a defective jury instruction that diluted the meaning of proof beyond a reasonable doubt—that "vitiate[d] *all* the jury's findings" and led the Court to conclude that there had been "no jury verdict within the meaning of the Sixth Amendment." *Sullivan*, 508 U.S. at 280-281. As a result, the Court concluded that "the entire premise of *Chapman* review [was] simply absent": Without any "jury verdict of

guilty-beyond-a-reasonable-doubt, the question whether the *same* verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless." *Id.* at 280.

This Court in *Neder* made clear that the same reasoning does *not* apply where a "constitutional error * * * prevents the jury from rendering a 'complete verdict.'" 527 U.S. at 11. *Neder* explained that the "strand of reasoning in *Sullivan*" cannot "be squared with [the Court's] harmless-error cases." *Ibid.* Although the failure to instruct the jury on an element of the offense was unconstitutional and necessarily "prevent[ed] the jury from making a finding on the element," *ibid.*, the Court could rely on "evidence of guilt the jury did not *actually* consider" to determine that the error was harmless under *Chapman*. *Id.* at 17; accord *Recuenco*, 548 U.S. at 220-221 (following *Neder* and holding that a court's application of a statutory sentencing enhancement without the requisite jury finding is subject to *Chapman* harmless-error review).

Neder forecloses petitioner's Sixth Amendment contentions. *Neder* makes clear that "[a] reviewing court making this harmless-error inquiry does not * * * 'become in effect a second jury to determine whether the defendant is guilty.'" 527 U.S. at 19 (citation omitted). It instead performs a "typical appellate-court" function when deciding whether an error is harmless based on the record of the case. *Ibid.*

C. The Non-Constitutional Hearsay Error In This Case Was Harmless

This Court conducts harmless-error inquiries only "sparingly." *Lane*, 474 U.S. at 450 (quoting *Hasting*, 461 U.S. at 510). And this case presents no compelling

reason to depart from that practice, given that the court of appeals applied the correct test and stated that it has already reviewed "the evidence as a whole." Pet. App. 16A.

In any event, the court of appeals correctly concluded that the district court's non-constitutional hearsay error was harmless. The admissible evidence of petitioner's guilt was sufficiently strong in relation to the impact of the error to provide a "fair assurance" that the error did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Kotteakos*, 328 U.S. at 765, 776.[8]

1. The government's case was very strong

It was undisputed at trial that petitioner was present at the scene of the aborted drug transaction; that he transported the money to pay for the drugs to the scene in a secret compartment in the Bonneville; that he parked the car in a location from which he could see Perez, Cruz, and the informant; and that he waited with Perez and Cruz at the parking lot for the informant's return.[9] Petitioner's defense at trial was that he lacked

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[8] The court of appeals did not state the applicable standard of review and may have imposed a burden higher than that demanded by *Kotteakos*. Pet. App. 16A (requiring proof that "a reasonable jury would have reached the same result"). Any such application would have benefitted petitioner. The dissenting judge mistakenly stated, without explanation, that the harmless-beyond-a-reasonable-doubt standard set by *Chapman* for constitutional errors applied to this case. See Pet. App. 23A, 28A.

[9] Petitioner's ability to see the meeting at the western edge of the Shell parking lot from his location at an adjacent parking space on the eastern edge of the Denny's lot was established by photographic exhibits and the testimony of law-enforcement officers. See App., *infra*, 2a-

knowledge, when all this occurred, that a drug deal was to take place. The following factors, in combination, strongly established petitioner's knowledge:

The Phone Records. The call records showed that from 4:26 p.m. on August 4 (when Cruz told Perez that the cocaine was ready) to approximately 5:30 p.m. the following day (when the attempted drug deal was aborted), petitioner and Perez made 38 calls to each other. J.A. 751-752. The records further showed that almost all of the phone conversations or series of conversations between Perez and Cruz arranging the transaction were followed within minutes by a phone conversation between Perez and petitioner. *Ibid.* Perez was shown to be in contact with petitioner on August 5 both when Perez would have been waiting for Cruz to go to Arlington Heights and when Perez was en route with Cruz to the meeting. Compare J.A. 751-752 (calls 51-52, 58, 60, 62) with p. 4, *supra*. Perez also contacted petitioner contemporaneously with Perez's face-to-face meeting with the informant. J.A. 752 (call 64); p. 5, *supra*. This evidence strongly suggested that Perez kept petitioner informed of the progress of the transaction. The fact that during the relevant period Perez was also in phone contact with other individuals is beside the point, for nothing suggests that any of those other individuals drove the Bonneville containing the cash to the scene of the aborted transaction.[10]

3a (exhibits); J.A. 49, 68, 71, 329; see also pp. 4-6, *supra* (discussing locations of the vehicles in the lots); J.A. 631-632.

[10] Petitioner argues (Br. 47) that petitioner and Perez were close and regularly exchanged phone calls. But that does not explain the frequency and timing of their phone conversations leading up to the aborted drug transaction.

Petitioner, the Bonneville, and $23,000. Petitioner drove Perez's Bonneville, which contained the $23,000 purchase price of the cocaine, to the planned scene of the transaction. Petitioner's own family members testified that petitioner owned his own car and that he never drove the Bonneville. J.A. 401, 409-410, 417. The defense's position was that petitioner used the Bonneville instead of his own car because, at the time, his car was inside his garage and the Bonneville was blocking it. It defies belief that petitioner's use of the car containing the cash for the drugs—a car he otherwise never used—was merely fortuitous.

Petitioner makes much (Br. 48) of Cruz's testimony that he asked Perez not to bring money or anyone else with him to meet the informant, and that the purpose of the meeting was only to inspect the drugs. J.A. 189, 194-195. But that was not *Perez's* plan because, even under the defense's theory of the case, Marina would have driven the Bonneville with the money to the scene. Moreover, Cruz testified that, just before Perez introduced him to petitioner, Perez apologized to Cruz for disregarding his instruction not to bring anyone else to the meeting. J.A. 220.

Petitioner's Flight. "Flight at the approach of * * * law officers" is a "strong indic[ation] of *mens rea*." *Sibron* v. *New York*, 392 U.S. 40, 66 (1968); see *Allen*, 164 U.S. at 499 ("the law is entirely well settled that the flight of the accused is competent evidence against him having a tendency to establish his guilt"). The courts of appeals likewise recognize that flight evidence may be highly probative of consciousness of

guilt.[11] That is particularly so where, as here, the flight entails extreme conduct: backing into two police squad cars; accelerating towards a law-enforcement officer who stepped in front of the car petitioner was driving, pointed his gun at petitioner, and then had to jump out of the way; gunning the car against and directly into oncoming rush-hour traffic; and attempting to escape on foot by running through the kitchen of a McDonald's. Such conduct poses a serious threat of injury both to the suspect and others. As the court of appeals observed, "[i]f there were degrees of flight, what happened here would be flight in the first degree." Pet. App. 16A.

The Court in *Wong Sun* v. *United States*, 371 U.S. 471, 483 n.10 (1963), expressed some skepticism about the probative value of flight evidence, and the court of appeals here recognized that flight evidence must be viewed "with caution." Pet. App. 16A. But, on its facts, this case could hardly be more different from *Wong Sun*. In *Wong Sun*, the "flight" consisted merely of a suspect's running down the hall of his own laundry establishment when the supposed customer at the door revealed that he was a narcotics agent. 371 U.S. at 482. The Court in *Wong Sun* stressed that the agent from whom the defendant ran had affirmatively misrepresented his reason for being on the premises; that the misimpression had not been adequately dispelled before the suspect fled; that the agent was not certain that he had the correct man; and that the agent's uninvited en-

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[11] See, *e.g.*, *United States* v. *Frazier*, 387 F.3d 1244, 1267 n.20 (11th Cir. 2004), cert. denied, 544 U.S. 1063 (2005); *United States* v. *Robinson*, 161 F.3d 463, 469 (7th Cir. 1998), cert. denied, 526 U.S. 1078 (1999); *United States* v. *Hernandez-Bermudez*, 857 F.2d 50, 54 (1st Cir. 1988); *United States* v. *Pope*, 561 F.2d 663, 669 n.6 (6th Cir. 1977); *Monnette* v. *United States*, 299 F.2d 847, 851 (5th Cir. 1962).

try into the suspect's own living quarters was unlawful. *Id.* at 482-484. Under those circumstances, the suspect's flight reflected "ambiguous" conduct that "signified a guilty knowledge no more clearly than did a natural desire to repel an apparently unauthorized intrusion." *Id.* at 482-483. But in this case, petitioner's conduct was not ambiguous, because he could not have been confused about the identity of the officers or the official nature of their actions. The courts of appeals have repeatedly and correctly distinguished the flight in *Wong Sun* from the sort of flight, like that here, that more reliably reflects consciousness of guilt.[12]

Petitioner argues (Br. 51) that the flight evidence was inconclusive because, as a parolee, he had reason to flee unrelated to the charged offense. An innocent parolee, however, would have surrendered to sort matters out with the authorities instead of fleeing. He would have known that fleeing, especially the sort of "first-degree flight" involved here, would only make things worse. Petitioner offers no support for his dubious assertion (*ibid.*) that his parole officer would have sought to have his parole revoked even if he had no knowledge of the drug-trafficking scheme and was merely an innocent bystander.

The Other-Crime Evidence. The government's other-crime evidence showed at trial that petitioner and Perez had engaged in a similar cocaine transaction in 2002. Like the transaction here, it took place in a park-

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[12] See, *e.g.*, *United States* v. *Franklin*, 323 F.3d 1298, 1302 & n.4 (11th Cir.), cert. denied, 540 U.S. 860 (2003); *United States* v. *Sheppard*, 901 F.2d 1230, 1237 n.11 (5th Cir. 1990); *United States* v. *Lima*, 819 F.2d 687, 689 (7th Cir. 1987); *United States* v. *Bailey*, 691 F.2d 1009, 1019 n.12 (11th Cir. 1982), cert. denied, 461 U.S. 933 (1983); *Pope*, 561 F.2d at 669 n.6.

ing lot and involved the use of a secret compartment in a car to carry the cocaine and cash ($15,000). The evidence that petitioner and Perez had previously worked together trafficking cocaine, and that they had used a similar *modus operandi*, forcefully undercuts petitioner's claim that he was merely an innocent bystander.[13]

Petitioner's Statements to Cruz. Cruz's testimony, while by no means essential to the government's case, also confirmed petitioner's guilty knowledge. Cruz testified that (1) petitioner stated, "tell him we got the money here," while Cruz was on the phone with the informant, J.A. 223; (2) petitioner then told Cruz that Perez had asked petitioner to be there, J.A. 220, and (3) petitioner said "I told you" ("te di[j]e") to Perez as he threw the Bonneville in reverse to escape the approaching officers, J.A. 227-228. Standing alone, this evidence might not be weighty in the harmless-error analysis, because a rational jury could have refused to believe Cruz in light of the consideration Cruz received from the government in exchange for his cooperation and other factors. But, viewed together, Cruz's testimony and the other evidence of petitioner's guilty knowledge were mutually corroborating.

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[13] Petitioner's observation (Br. 52-53) that petitioner and Perez both communicated and met with the buyer directly in 2002 does not undercut the probativeness of the other-crime evidence in establishing petitioner's guilty knowledge. Petitioner and Perez had previously engaged in drug trafficking together; the earlier transaction, like the one in this case, took place in a commercial parking lot; and both transactions involved petitioner and Perez using a car with a secret compartment in the same location to carry cash and drugs. Indeed, the evidence showed that petitioner had helped Perez purchase the Bonneville a few months before the aborted drug deal.

2. The defense case was very weak

Petitioner's defense at trial was very weak compared to the case presented by the government. It rested almost entirely on Marina's testimony that her husband asked her to pick him up in Arlington Heights; that she asked petitioner to perform that chore after Perez had already left; and that she told petitioner to take the Bonneville because it was more convenient than taking his own car. That testimony was powerfully impeached by the government and it asked the jury to accept an exceedingly implausible story in light of other established facts.

In the government's rebuttal case, Marina admitted that she had met several times with petitioner's lawyer, J.A. 530-531, 537, 539, and that she believed that petitioner's lawyer would help her husband obtain a favorable sentence if he would plead guilty and refuse to incriminate petitioner, J.A. 537-538. The prison-phone recordings, the admission of which the court of appeals upheld for the purpose of establishing Marina's biased state of mind (Pet. App. 14A-15A), revealed that Marina and Perez discussed petitioner's counsel's offer to help Perez obtain a favorable sentence, J.A. 772, 776, and that Marina believed that petitioner faced the same likelihood of being convicted as did Perez. J.A. 766, 777. Not surprisingly in light of that powerful impeachment evidence, the district court at sentencing noted that Marina was not a "very credible witness." 12/4/2009 Tr. 38.

Marina's testimony also asked the jury to accept the proposition that Perez wanted *her* to drive his car to a drug transaction and that petitioner unwittingly stumbled into a cocaine deal roughly similar to the one he previously committed with Perez. First, if Marina's story were true, Perez, who knew that he had concealed

$23,000 in cash in his car—*i.e.*, the exact purchase price for the cocaine that Perez had learned only one day before—would have intended his wife to drive that car with the money to a major drug deal in the suburbs. There is no basis for concluding that Perez had exactly $23,000 in his car for any reason other than to purchase the kilogram of cocaine on August 5. It makes little sense that Perez would depend on his own wife to drive the cash—unknowingly—to a major drug deal at the right time so that he could complete the transaction. See J.A. 636.

Second, according to Marina, Perez was picked up at petitioner's home around 4:00 p.m. by an unknown individual. But the evidence (including call transcripts, J.A. 592-593) showed that Perez was later picked up by Cruz at Irving Park Road and Harlem Avenue, a location just beyond the halfway point on the ten- to 20-minute drive from petitioner's to Perez's home. Cf. App., *infra*, 1a (map); J.A. 420, 562-563. Thus, if Marina were correct, Perez obtained a ride from an unidentified, third party simply to travel a short distance in order to wait for another ride from Cruz. That odd itinerary makes little sense.

Third, Marina testified that petitioner left about 5:00 p.m. to get Perez. But the government's informant did not tell Cruz and Perez about the Shell-station meeting point until they had already arrived next to the station at the freeway exit. See, *e.g.*, J.A. 593 ("Call me when you exit, so I can tell you exactly where.") (call transcript). If Marina's story were correct, petitioner would have been on the road in Perez's car during his 5:05, 5:22, and 5:24 p.m. calls to Perez (J.A. 752) traveling in the general direction of Arlington Heights while Perez himself was en route, unable to advise petitioner where

exactly to go. The idea that petitioner believed that Perez was out with friends driving to some location in the suburbs, which Perez himself did not know, only to be picked up immediately upon arrival by petitioner for the return home is inherently implausible.

Ultimately, Marina's story requires not just one or two implausible conclusions but a long string of circumstances—each exceedingly unlikely in its own right—to proceed one after the other, with all of the independent factors that point to petitioner's guilt being chalked up to bad timing and bad luck. In light of petitioner's cocaine-deal history with Perez and the balance of the evidence, Marina's impeached testimony provided only an exceedingly weak defense. An average, rational jury considering the evidence as a whole would have concluded that Maria's story did not add up and that petitioner was guilty beyond a reasonable doubt. Even after the likely impact of the error in this case is considered, the evidentiary record provides a "fair assurance" that the error did not have a substantial and injurious effect or influence on the jury's verdict.

3. The prejudicial impact of the error was not significant

Petitioner vastly overstates the prejudicial impact of the admission of the prison-phone recordings for their truth. His argument rests on two points—that the recordings, admitted for their truth, would have led the jury to believe (1) that defense counsel wanted petitioner to plead guilty, and (2) that counsel personally thought petitioner was guilty. Br. 58-60. Neither point has merit.

The error that petitioner claims was harmful did not affect *anything* that the jury heard in this case. The

court of appeals held that the prison-phone recordings were properly admitted into evidence as proof of Marina's bias and prior inconsistent statements. Pet. App. 14A-15A; cf. J.A. 524 (petitioner's request that entire recordings be admitted under Fed. R. Evid. 106). Petitioner has never challenged those holdings in this Court. The jury thus properly could consider the recordings as non-hearsay proof that Marina and Perez actually made the statements therein. The district court's error was simply in failing to provide a limiting instruction directing the jury not to consider the recordings as proof that the recorded statements made by Marina and Perez were themselves true. The prejudicial impact of that error was not significant.

1. The recordings do not indicate that defense counsel wanted petitioner to plead guilty. In the relevant passage, Perez told Marina about a conversation he had had with petitioner:

> Marina Perez: So what'd Beau [petitioner's counsel] tell [petitioner]? What did Beau tell him?
>
> Joel Perez: A blind plea would be good, then he can guarantee this and that. You know what I mean? Just certain things, you know? I got to explain to you.
>
> Marina Perez: He's telling him about a blind plea also?
>
> Joel Perez: Yeah, he is. I gotta explain to you. You know what I mean. He says, if you want, have his wife talk to me, this or that. I have to explain to you tomorrow.

J.A. 771. Perez again emphasized that point:

> Joel Perez: You have to see what Beau has to say, just listen to him and he'll explain to you. He said, ask his wife to come to my office and I'll explain it to her.
>
> Marina Perez: Tell me?
>
> Joel Perez: Yes.

J.A. 774. Properly understood, Perez is saying here that petitioner told Perez that petitioner's counsel had "also" told petitioner that it "would be good" if *Perez*, not petitioner, entered a blind guilty plea,[14] and that petitioner's counsel wanted to discuss the matter with Marina, who in fact reported to Perez the next day that she had spoken to counsel. J.A. 776; see pp. 11-12, *supra*. Petitioner's contrary reading of the conversation makes no sense. If petitioner's counsel had suggested that petitioner plead guilty, there would have been no reason for petitioner's counsel to discuss the matter with Marina.

Petitioner's reading is also irreconcilable with the recorded conversations as a whole. The overarching subject of the conversations is petitioner's counsel's attempt to persuade Perez and Marina to assist in a strategy whereby Perez would plead guilty and avoid implicating petitioner; counsel would help Perez obtain a favorable sentence in return; and petitioner, with the Perezes' cooperation, would proceed to trial. See pp. 10-12, *supra*; J.A. 759-778. Given that context, a rational jury would not have understood the passage as indicating that petitioner's counsel wanted *petitioner* to plead guilty. Even when read in isolation, the passage is at

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[14] A blind plea is a guilty plea entered without a plea agreement. Pet. App. 22A n.3.

best ambiguous and, as such, should not have had a significant impact on the jury's verdict.

2. Petitioner claims that the prison-phone recordings, admitted for their truth, would have led the jury to believe that petitioner's counsel thought that his client was guilty. Petitioner focuses on the following:

> Joel Perez: I don't understand babe what's going on, but it's not the way, Beau's, he's putting it two different ways. If he didn't explain to you the way, the either or, then it's a different story. If you didn't ask him, then. . . .
>
> Marina Perez: Yes, *he's saying that everybody is going to lose.* He's saying whatever he wants to say. I don't believe him.
>
> Joel Perez: I don't know what's going to happen. I just can't wait to see you tomorrow.
>
> Marina Perez: Well, what he's saying is stupid, that does not make sense.

J.A. 769 (emphasis added). Petitioner's reliance on this dialogue overlooks its timing. The statement that "everybody is going to lose" does not convey the belief that "everybody is guilty." When counsel allegedly made that statement, Marina testified that she had yet to discuss with him the events of August 5, 2008. J.A. 551-552. If that is credited, counsel would not have known that Marina would corroborate petitioner's defense that he was an innocent bystander, and without Marina's testimony petitioner would have had little to offer to explain his presence at the drug deal.[15] Indeed, as Ma

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[15] Marina testified that she did not discuss the events of August 5, 2008, with petitioner's counsel until August 20, 2009, a week after the

rina herself understood at the time, counsel's purpose in making the statement was to persuade the Perezes to cooperate with petitioner's defense and provide exculpatory testimony. In short, the recorded conversations provided no sound reason for the jury to think that, at the time of trial, counsel believed that his client was guilty.

3. Petitioner argues (Br. 60-61) that the government's actions at trial, such as obtaining a continuance after the defense rested its case in order to study the prison-phone recordings and seek their admission, reveal that it regarded those recordings as important rebuttal evidence.[16] The government did regard the recordings as helpful to its case, but not because of the passages to which petitioner objects. Rather, the government sought the admission of the recordings because they demonstrated in Marina's own words her biased state of mind. The government explained in district court that it was offering the recordings as prior inconsistent statements and for the purpose of "showing [Marina's] bias, her motivation to lie." J.A. 517. And the

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last recorded conversation between her and her husband and five days before the commencement of trial. J.A. 551.

[16] The request for a continuance did not have the effect of emphasizing the disputed evidence. After the defense rested on a Thursday, the court sent the jury home for the weekend, explaining that it had other matters to address on Friday. J.A. 454. The government's motion was filed over the weekend and argued on Monday. J.A. 458-469. The court informed the jury that unforseen matters required a one-day continuance, J.A. 473, and, when the trial resumed, the government presented testimony from Marina and three other witnesses in addition to playing the prison-call recordings (JA 572-573, 585). See J.A. 529-594. The continuance thus may have reflected the government's attempt to impeach Marina, but it did not emphasize counsel's disputed statements, which are addressed only briefly on the recordings.

government made clear that the recordings "will *not* be introduced for the truth of the matters asserted." *Ibid.* (emphasis added). Indeed, at the hearing on the motion, neither of the parties even adverted to the offending passages. Petitioner's counsel argued only that the recordings should be excluded because of hearsay, reliability, and relevancy concerns, not because of the prejudicial content of any statements on the recordings attributed to counsel. J.A. 515-527.

The government in its rebuttal case did ask Marina whether defense counsel stated that "everybody was going to lose" when examining Marina to reveal her bias. J.A. 533. But the important point is that, in answering the question, Marina denied that counsel said any such thing. J.A. 534. Instead, she testified that counsel had stated only that "my husband [wa]s f---ed." *Ibid.* In any event, the jury would have understood that any such statement by counsel did not reflect a belief on his part at the time of trial that petitioner was guilty. See pp. 49-50, *supra*.

Contrary to petitioner's suggestion (Br. 62), the government made no reference whatever in its closing arguments to anything in the recordings suggesting that defense counsel wanted petitioner to plead guilty, or that he thought that "everybody [would] lose" if Perez decided to go to trial. See J.A. 644-646, 710-717. The government used Marina's rebuttal testimony and the prison-phone recordings in its initial closing argument for the purpose of showing that Marina was a biased witness because of her belief, "right or wrong, that the defendant's attorney could help her husband with his own case." J.A. 645. And, in its rebuttal argument, the government used the recordings in support of the same point: "[Marina] believes, rightly or wrongly, that the

defense is going to make certain motions on behalf of her husband at sentencing and that the defense was guaranteeing her husband a lower sentence." J.A. 711. It also referred to the recordings as establishing that *Marina*, not petitioner's counsel, believed that petitioner was in as much trouble as Perez. J.A. 717. If anything, the government's *total* neglect of the allegedly prejudicial parts of the recordings in its closing argument supports the finding of harmlessness.

Taking into account the strength of the untainted evidence of guilt, the weakness of the defense case, and the negligible prejudicial impact of the error, there is a "fair assurance" that the error did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Kotteakos*, 328 U.S. at 765, 776.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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Solicitor General

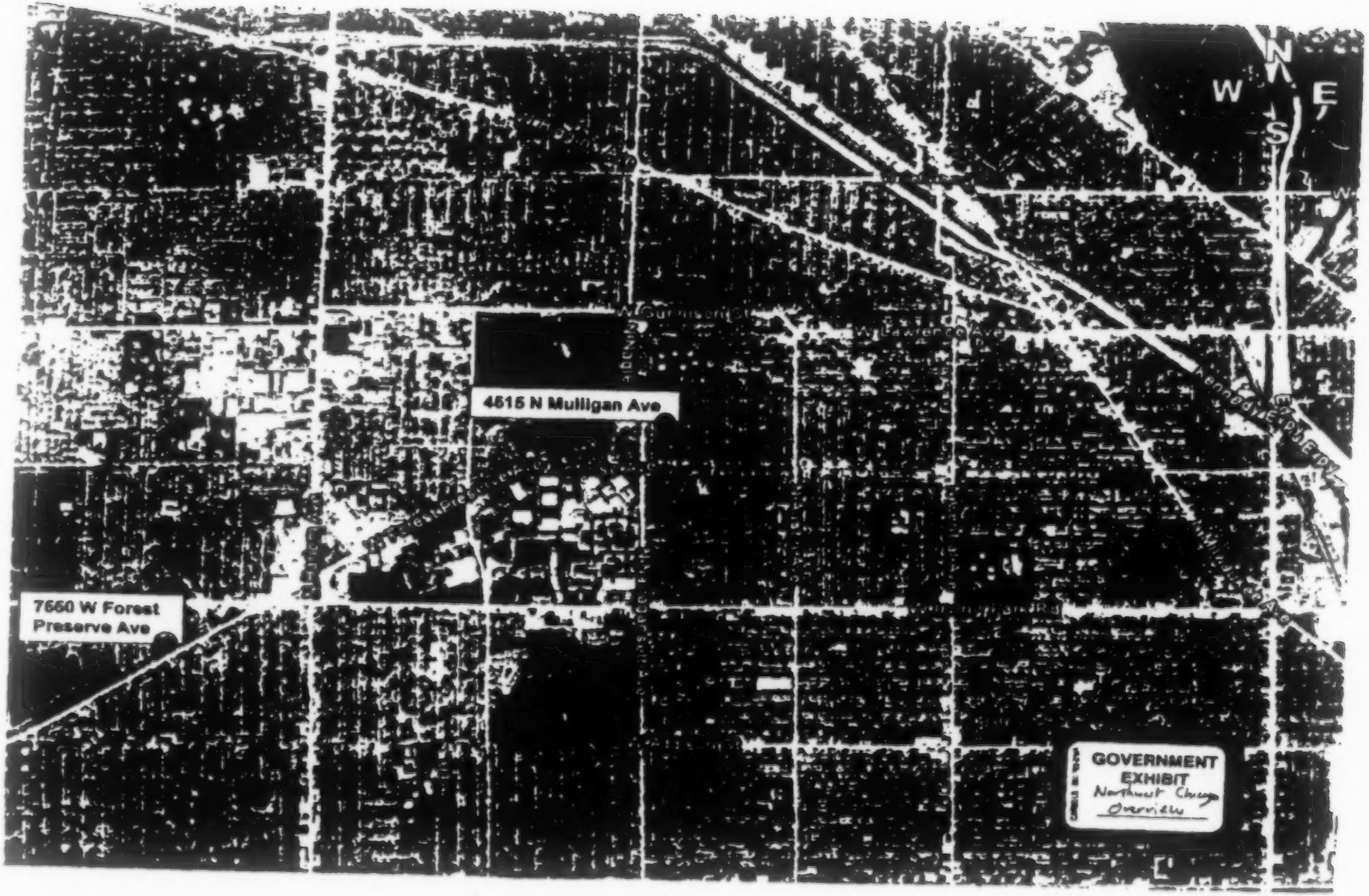
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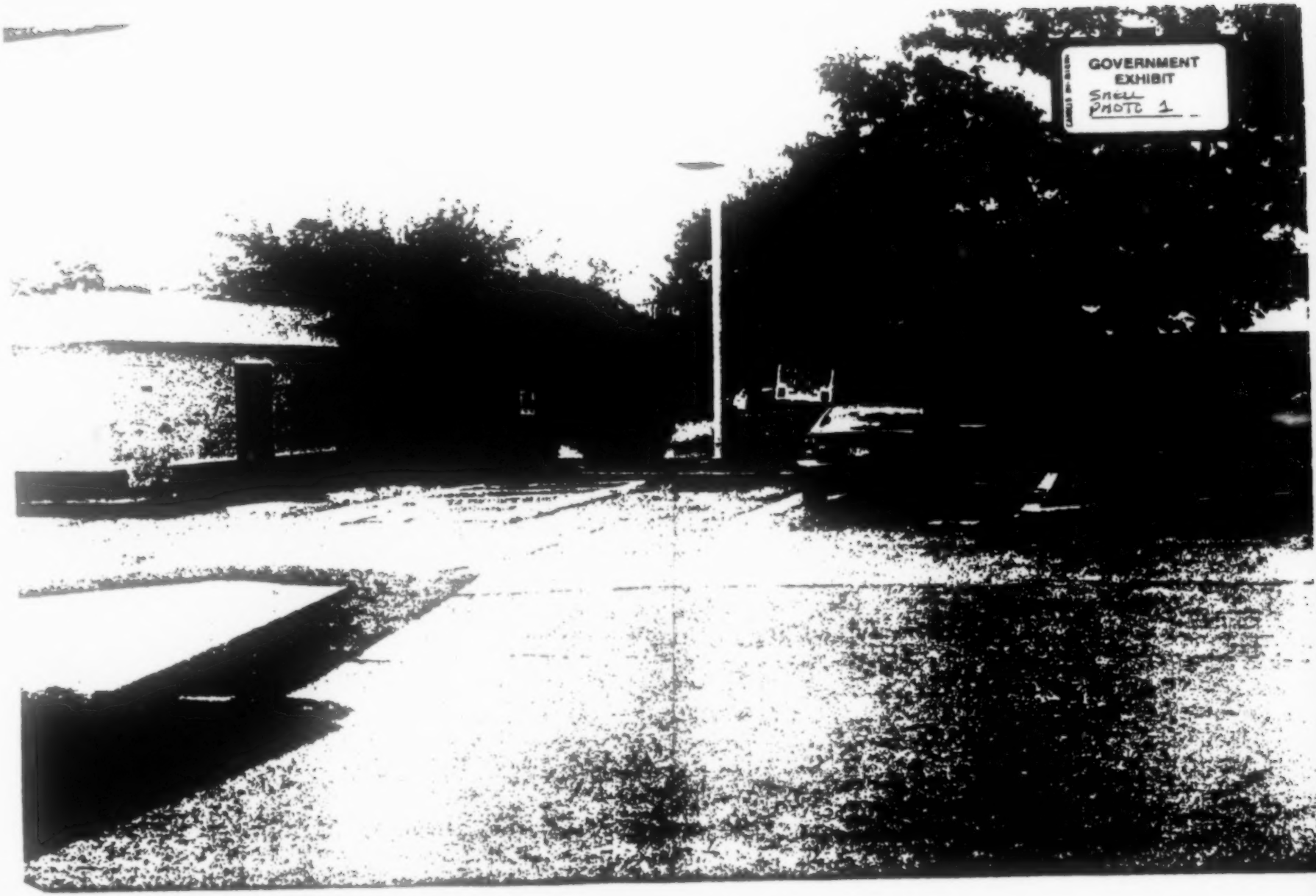
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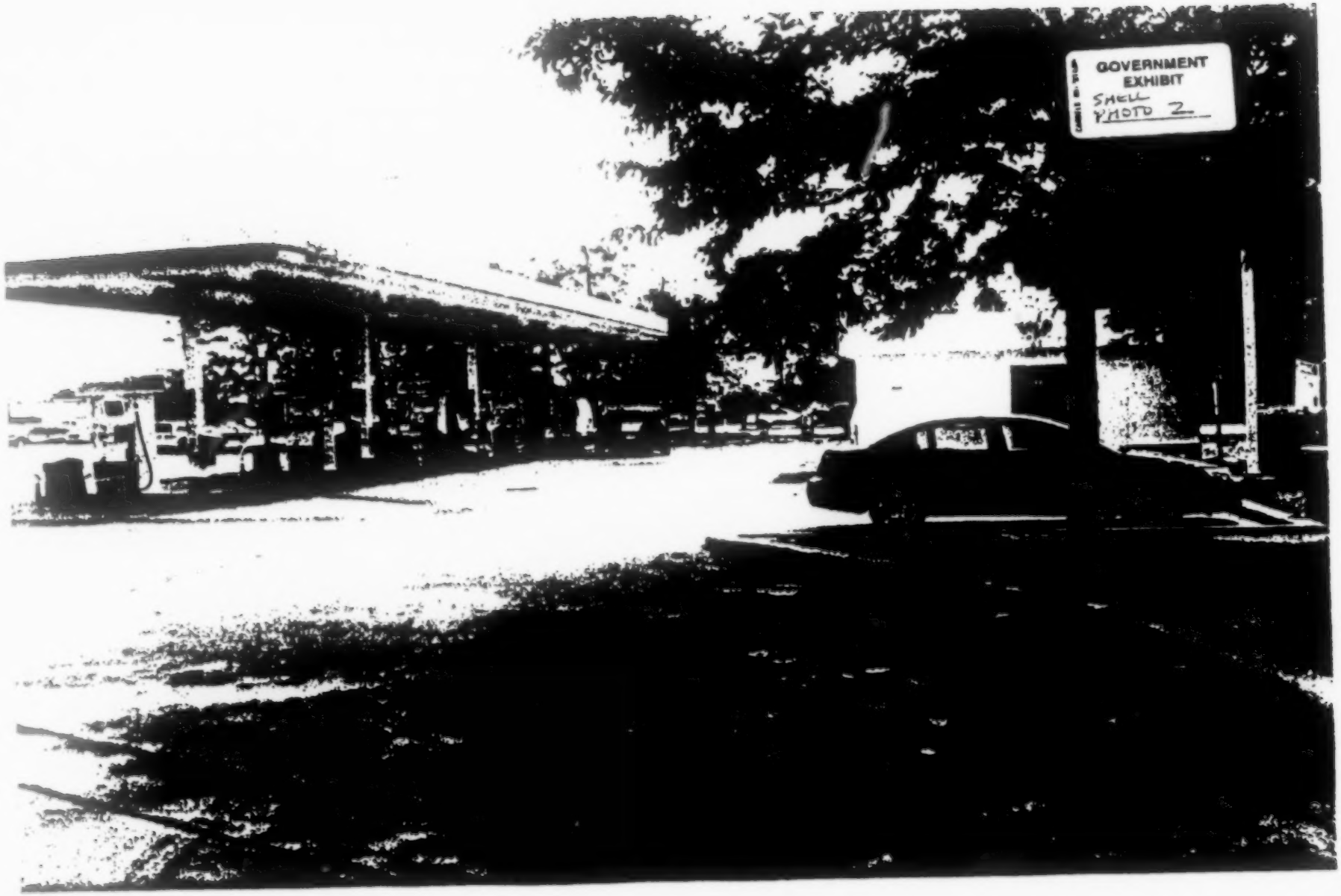
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REPLY BRIEF

NO. 11-199

IN THE SUPREME COURT
OF THE UNITED STATES

ALEXANDER VASQUEZ,

Petitioner,

- v -

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Seventh Circuit

REPLY BRIEF FOR THE PETITIONER

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ARGUMENT

A. Respondent provides no reason to deviate from this Court's long line of harmless-error cases that require a reviewing court to focus on whether the error affected the jury's verdict.

Respondent portrays the issue here as nothing more than a dispute about applying a settled standard to a set of facts, ignoring the lower-court conflict regarding how to determine if a trial error is harmless. That conflict is the reason this case is here and it is where Petitioner begins because it provides the needed context to understand the correct analysis and why the court of appeals erred. As Petitioner's opening brief explained, the lower courts conceptualize the harmless-error test in two contradictory ways:

- Under the first view, courts of appeals determine whether the error affected the jury's verdict by examining the entire trial record, with a focus on the prejudicial nature of the error viewed in relation to the properly-admitted evidence. Judge Harry Edwards, in his seminal article on harmless error, called this the "effect-on-the-verdict approach." Harry T. Edwards, *To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. Rev. 1167, 1171 (1995).

- Under the second view, courts of appeals decide harmlessness by determining whether, in a trial absent the error, a jury would have convicted the defendant anyway, which requires courts to focus strictly on the government's case to look for what is usually labeled "overwhelming evidence" of guilt rather than looking at the prejudicial nature of the erroneously-admitted evidence. Judge Edwards called this the "guilt-based approach." *Id.*

By failing to mention the lower-court conflict, Respondent implicitly denies there is anything to clarify and recites a test that borrows from both the effect-on-the-verdict approach—see, e.g., Resp. 20-21 ("harmlessness requires consideration of the impact of the error on the jury's verdict in relation to all else that happened" (internal quotation marks and citation omitted))—and the guilt-based approach—*id.* at 19 ("appellate courts [must] review the record to form a judgment whether, absent the error, the ultimate outcome likely would have been the same"). But an approach that asks whether an error affected a jury's verdict differs conceptually from an approach that asks whether the defendant, in an error-free trial, would have been convicted anyway. The former attempts to discern whether the prejudicial nature of the error influenced the jury's verdict, in light of the evidence presented; the latter ignores the nature of the error and instead attempts to determine whether, in the court's view, the defendant was guilty and, consequently, that any retrial would end in a conviction. Put another way, if under the effect-on-the-verdict approach the

government cannot show that the error did not "substantially influence[] the jury's decision," *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995), a court would find that an error was not harmless, even if the trial's outcome would likely have been the same absent the error; the guilt-based approach, on the other hand, is only concerned with whether a trial's outcome, in the reviewing court's view, would be the same.

Respondent's apparent belief that the standards are conceptually compatible is not shared by appellate judges around the country. For example, Judge Jon Newman has flagged the two approaches—"whether the reviewing court is to consider the effect of the error on the jury or predict what verdict would have been rendered in the absence of the error"—and noted that the approaches are "conceptually distinct." *United States v. Peck*, 102 F.3d 1319, 1326 (2d Cir. 1996) (Newman, J., concurring) (citing Edwards, *supra*, at 1187, 1199-1203). State appellate judges have also noted the dueling tests. After a justice on the Washington Supreme Court pointed out the "vastly different tests" in conducting harmless-error review, *State v. Evans*, 633 P.2d 83, 86 (Wash. 1981) (Brachtenbach, C.J., concurring), the court expressly rejected an approach that would attempt to determine whether "the tainted evidence . . . could have contributed to the fact finder's determination of guilt" (the effect-on-the-verdict approach) in favor of a standard that would strip the error from the trial and determine if there was overwhelming evidence of guilt (the guilt-based approach), *State v. Guloy*, 705 P.2d 1182, 1191

(Wash. 1985).[1] Thus, appellate judges recognize that the tests conceptualize harmless-error analysis in fundamentally incompatible ways.

The closest Respondent comes to justifying the peaceful co-existence of both standards is its cryptic statement that this Court's "decisions demonstrate that a court's determination of harmlessness can properly rest on the conclusion that the admissible evidence of guilt is sufficiently strong, such that the prejudicial effect of erroneously-admitted evidence can be deemed not to have altered the outcome." Resp. 29. If Respondent means to merely say that, if the evidence of guilt is strong enough, that can outweigh the prejudicial effect of a particular error, that is true; a strong government case is a factor—just not the *only* factor—in determining harmlessness under the effect-on-the-verdict approach. On the other hand, if Respondent means to say that if its case is strong enough, there is no need to analyze how prejudicial an error might have been because any error committed at trial will necessarily be harmless—the guilt-based approach—nothing in this Court's decisions supports that view.[2]

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[1] Likewise, some lower-court decisions have explicitly adopted the effect-on-the-verdict approach and rejected the guilt-based approach. See *Gov't of the V.I. v. Martinez*, 620 F.3d 321, 337 (3d Cir. 2010); *Wilson v. Mitchell*, 498 F.3d 491, 504 (6th Cir. 2007); *United States v. Cunningham*, 145 F.3d 1385, 1388 (D.C. Cir. 1998).

[2] Respondent cites *Milton v. Wainright* and *United States v. Hasting* as cases where this Court focused exclusively on the strength of the government's evidence. Resp. Br. 28. However, in *Milton*, 407 U.S. 371, 375-76 (1972), the Court considered the error's effect, finding that the details of the erroneously-admitted evidence "were essentially the same as those given in the prior confessions not challenged." In *Hasting*, 461 U.S. 499, 510-11 (1983), the Court noted the error and considered the

See Pet. Br. 16-33. Rather, this Court examines the weight of the government's evidence against the error's prejudicial nature; the only time this Court focuses strictly on the government's case to determine if an error affected the jury's verdict is in the rare case where the error concerned evidence regarding an uncontroverted element of the offense, in which case there could be no prejudice from the error, given that the element at issue was undisputed and any error, by definition, could not have affected the jury's verdict. See *Neder v. United States*, 527 U.S. 1, 18 (1999).

Even the States' *amicus* brief acknowledges that lower courts have applied two distinct tests, both of which it urges this Court to adopt. See States' Amicus Br. 5-6. In trying to justify the guilt-based approach, the States demonstrate why this approach raises serious Sixth Amendment concerns. The *amici* chide Petitioner for never "even claim[ing] [on appeal] that he is factually innocent of the crimes for which he was convicted." *Id.* at 7-8. Not only has Petitioner always maintained his innocence, he was under no obligation to argue his innocence to the court of appeals or this Court. This Court explained almost seven decades ago: "[I]t is not the appellate court's function to determine guilt or innocence," as "[t]hose judgments are exclusively for the jury . . . ." *Kotteakos*, 328 U.S. at 763. By advocating for a guilt-based approach, and a silent overruling of *Kotteakos*, *amici* would permit convictions based on a verdict affected by erroneously-admitted evidence as long as an appellate court thought the defendant

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likely impact on the jury of both the government's evidence and the defendants' "totally inconsistent theories" of defense. This Court did not focus exclusively on the government's evidence.

guilty. That is not the criminal justice system set up by the Framers, who would be surprised to learn that appellate judges would decide a defendant's guilt on a cold record—something that they are ill-equipped to do.[3] The Constitution allocated guilt-determinations to juries, not judges. That is what motivated this Court in *Kotteakos* to adopt the effect-on-the-verdict approach. See 328 U.S. at 763. When a defendant is convicted only after a jury's verdict is infected by judicial error and appellate judges find the error harmless because the evidence suggests to *them* that the defendant is guilty, the jury's function has been wholly removed. This creates serious Sixth Amendment concerns,[4] which are eliminated by adopting the effect-on-the-verdict approach, see Pet. Br. 33-42. See also Edwards, *supra*, at 1192-93 (arguing that the guilt-based approach is "inconsistent with the constitutional framework of our judicial system," whereas the effect-on-the-verdict approach ensures that "there is no invasion of the province of the jury").

The primary way Respondent engages with

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[3] As Petitioner's opening brief pointed out, Pet. Br. 43, the spate of DNA exonerations over the past decade validate the serious concerns that reviewing courts are poorly suited to determine whether a defendant is obviously guilty. See Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 107 (2008); see also Edwards, *supra*, at 1192 (arguing that "[c]oncern over the institutional competency of the appellate courts also strongly counsels against the practice of focusing solely on the question of factual guilt").

[4] Respondent claims that *Neder* forecloses Petitioner's Sixth Amendment argument. Resp. Br. 37. To the contrary, *Neder* itself recognizes the Sixth Amendment concerns involved in harmless-error analysis. 527 U.S. at 19 ("Of course, safeguarding the jury guarantee will often require that a reviewing court conduct a thorough examination of the record").

Petitioner's description of the harmless-error test is to contend that the analysis is objective, not subjective. See Resp. 21-22, 31-32. But Petitioner never argued for a subjective consideration of the jury's unknowable thought process; rather, he contended that this Court should continue to review the entire trial record to determine whether the error affected the verdict. See, e.g., Pet. Br. 19. Moreover, the fact that the analysis is objective does not mean—as Respondent contends, see Resp. 31-32—that a reviewing court should not take cues from the jury in determining whether a particular error was harmless. In evaluating whether an error was harmless, this Court has relied on objective jury behavior, such as the length of deliberations, see *Parker v. Gladden*, 385 U.S. 363, 365 (1966), a jury's note about an instruction, see *Francis v. Franklin*, 471 U.S. 307, 326 (1985), and the difficulty a jury had in reaching a verdict, see *Krulewitch v. United States*, 336 U.S. 440, 444-45 (1949). See also *Fry v. Pliler*, 551 U.S. 112, 124-25, n.4 (2007) (Stevens, J., dissenting) (relying on jury behavior to evaluate harmlessness). As this Court implicitly recognized in those cases, a jury's objective indications can provide evidence of whether an error influenced the verdict.

Respondent's discussion of harmless error reflects the confused approach many lower courts have used—taking quotes from this Court's decisions out of context and advocating a guilt-based approach that this Court has never embraced. See Pet. Br. 14-26. Respondent mostly offers this Court sound bite quotes from cases without providing an overarching, coherent test to resolve the lower-court dispute. Thus, Respondent's brief asks this Court to affirm

the confused status quo. Petitioner asks that this Court reject Respondent's invitation, reject the guilt-based approach, and make clear that:

> In reviewing for harmless error, a reviewing court must ask, "Do I, the judge, think that the error substantially influenced the jury's decision?" *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995). That means the court must determine whether the error at issue "contributed to the verdict," *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963), which cannot be done by simply "stripping the erroneous action from the whole" of the evidence and determining whether the court thinks the defendant would be convicted in an error-free trial, *Kotteakos v. United States*, 328 U.S. 750, 763 (1946). This analysis requires courts to look at the entire trial record and examine the nature of the error to determine "what effect the error had or reasonably may be taken to have had upon the jury's decision." *Id.* at 764. The strength of the government's case is one factor—but not the sole factor—in determining whether an error is harmless.

B. The Seventh Circuit applied the guilt-based approach, focusing strictly on the government's evidence.

Respondent's defense of the lower court's harmless-error analysis vividly demonstrates the need for this Court to clarify the controlling standard.

According to Respondent, "the court of appeals stated the correct standard of harmlessness," when the court wrote that it needed to determine if a "'reasonable jury would have reached the same verdict without the challenged evidence.'" Resp. 13 (quoting Pet. App. 16A). But that is not the correct standard. The majority articulated the guilt-based approach to harmless error, which meant that it would ignore the prejudicial nature of the error and simply determine whether the court believed Petitioner would be convicted in an error-free trial. This was consistent with the Seventh Circuit's rejection of the effect of the error test. *Lanier v. United States*, 220 F.3d 833, 839 (7th Cir. 2000).

While Respondent notes that the court stated that it would "'look[] at the evidence as a whole,'" see Resp. 30 (quoting Pet App. 16A), Respondent neglects to mention that, in the next sentence, the court wrote, "What was the evidence?," and then discussed the government's evidence and *nothing else*, thereby elucidating what it meant by "evidence as a whole." See Pet. App. 16A. The court even viewed the evidence in the light most favorable to the government, assuming things were true—for example, that Petitioner told Cruz "tell him we got the money," Pet. App. 16A—that Petitioner vigorously challenged during cross-examination. See

also Roger J. Traynor, THE RIDDLE OF HARMLESS ERROR 28 (1970) (noting that reviewing courts "all too often" apply harmless error only by assuming that the jury "believed all properly admitted evidence against [the defendant] and disbelieved all evidence in his favor"). After its one-sided discussion of the evidence, the court ended its analysis by stating that, "[t]his evidence"—*i.e.*, only the government's evidence, viewed in the light most favorable to the government—"would have moved the jury to convict Vasquez without a nudge from anything it heard in the government's rebuttal case." Pet. App. 16A.

In other words, this was a case where "the weight of the evidence against a defendant [was] not just one factor playing into the harmless-error analysis but rather the *sole* criterion by which harmlessness [was] gauged," something Judge Edwards explained has become common in lower courts applying the guilt-based approach. Edwards, *supra*, at 1187 (emphasis added). As a result, for the majority, it was *irrelevant* that any juror who found a defense witness (Marina) credible would have voted to acquit Petitioner. And it was equally *irrelevant* that the erroneously-admitted evidence in this case was, as the dissent described, "just about as prejudicial as one could expect to encounter," Pet. App. 26A—a characterization never disputed by the majority. The lower court did exactly what this Court has said courts should not do: "look at the printed record, resolve conflicting evidence, and reach the conclusion that the error was harmless because [the court] think[s] the defendant was guilty." *Weiler v. United States*, 323 U.S. 606, 611 (1945).

This case illustrates how courts have stretched the decision in *Harrington v. California*, 395 U.S. 250, 254 (1969), to invent the guilt-based approach. See Pet. Br. 20-22. In *Harrington*, this Court focused on the strength of the government's case—which this Court called "overwhelming"—because the erroneously-admitted evidence established something (presence at the scene) that the defendant himself had already admitted and which was not an issue in the case. 395 U.S. at 254. To determine whether the error was harmless, the Court first had to consider the error's effect. It was only after identifying that the erroneously-admitted evidence was cumulative that this Court was able to say that the error did not "affect[] . . . substantial rights." *Id.* Thus, courts have not only misread *Harrington* to create a harmless-error test that allows them to avoid determining whether an error affected the jury's verdict, but they are also watering down the "overwhelming" standard such that cases like this one, where not only is the evidence not overwhelming—notably, neither Respondent nor the court of appeals claimed that the evidence meets that standard—but the case involves a highly prejudicial error that went to the heart of a hotly disputed case.

The lower court decision perfectly captures the dangers of the guilt-based approach. Courts examine the strength of the government's case, decide the defendant is probably guilty, sometimes use the phrase "overwhelming evidence," and then declare any error, no matter how pernicious, to be harmless, without even analyzing its effect. But, as this Court noted in *Kotteakos*, "the question is not were [jurors] right in their judgment, regardless of

the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision." 328 U.S. at 764. Petitioner asks that this Court re-affirm that standard and repudiate the guilt-based approach.

C. Respondent's contentions about the weight of the evidence are unsupported by the record and exemplify the problems with a guilt-based approach to harmless error.

The harmless-error analysis advocated above focuses on the effect of the error in the trial that actually took place. In looking at what happened at the trial, the burden of showing that an error is harmless is on the government and the proper allocation of that burden can be outcome-determinative. *Gamache v. California*, 131 S.Ct 591, 593 (2010) (stating that "allocation of the burden of proving harmlessness can be outcome determinative") (Sotomayor, J., statement respecting denial of certiorari). Respondent's fact analysis is flawed because it effectively shifts the burden by asking this Court to resolve disputes about credibility and to view the evidence in the light most favorable to the government.

This Court should thus clarify what the proper harmless-error standard is and provide lower courts guidance by conducting the analysis in this case. Once the correct analysis is done, Respondent cannot meet its burden to establish that there is a "fair assurance" the non-constitutional error here did not influence the jury's verdict. See *O'Neal*, 513 U.S. at

438 (quoting *Kotteakos*, 328 U.S. at 764-65).

1. The error in this case was very prejudicial.

Respondent attempts to minimize the error's prejudicial nature by making arguments to this Court that the jury never heard. This attempt to recast the evidence in a different light on appeal demonstrates the problem with the government's analysis. It is not Petitioner's burden to prove that the jury relied on the erroneously-admitted evidence; it is Respondent's burden to prove that they did not. To meet that burden, Respondent must focus on the trial that actually took place.

The error was admitting two statements made by defense counsel for the truth of the matters asserted: "Everyone is going to lose," J.A. 585, and "[Defense counsel] is telling [Petitioner] about a blind plea also," J.A. 771. Allowing a jury to infer that a defendant's own attorney thought he was guilty is "just about as prejudicial as one could expect to encounter in a trial." Pet. App. 27A. Respondent attempts to minimize these prejudicial statements through creative interpretation.

According to Respondent, "the statement 'everybody is going to lose' does not convey the belief that 'everybody is guilty.'"[5] Resp. Br. 49. But this is

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[5] Respondent contends that this statement does not show that counsel believed Petitioner guilty at the time of trial. Resp. Br. 50. This argument assumes that counsel did not know about Mrs. Perez's exculpatory testimony until after saying "everybody is going to lose." That supposition is false. At trial Mrs. Perez testified that counsel already knew what happened at the time he made that statement. J.A. 548-49.

entirely inconsistent with the government's position before the jury. During its examination of Mrs. Perez, the government presented the statement "everyone is going to lose" as an admission by Petitioner's attorney of Petitioner's guilt.

> Q: And you said that the defendant attorney was saying that everybody was going to lose, didn't you?
>
> A: No. The defense attorney was telling me that my husband was –
>
> Q: It's a simple question. And you said that the defense attorney was saying that everybody is going to lose, didn't you?
>
> A: That my husband was fucked, That that was what I remember, yes.
>
> Q: And you said that the defense attorney was saying that everybody was going to lose, didn't you?
>
> A: I don't remember that. I just remember worrying about my husband. I don't recall everybody was going to lose. I remember that my husband would lose.

J.A. 533-534. As is evident in this exchange, the government's theory was that defense counsel supposedly believed everyone—Mr. Perez *and* Petitioner—was going to lose and said as much to Mrs. Perez. If the statements meant what Respondent now argues for the first time in this Court, trial counsel's insistence on emphasizing the statement and refusing to accept the witness's suggestion that it did not refer to Petitioner losing the case—going so far as to cut off the witness—would be senseless. After this exchange, the government played the call to demonstrate that, according to Mrs. Perez, Petitioner's attorney did say, "*everyone* is going to lose." J.A. 585 (emphasis added). Indeed, the dissent also interpreted the testimony to mean that Petitioner's counsel thought his own client would lose at trial. Pet. App. 28A.

Respondent's arguments regarding the second prejudicial statement ("He [defense counsel] is telling him [Petitioner] about a blind plea also," J.A. 771) are similarly misdirected. Respondent asks this Court to interpret this statement as referring to Petitioner's attorney discussing *Perez* entering a plea. Resp. 48. The purpose of harmless-error analysis is not to make subtle arguments about word choice.[6] At trial, this call was not heard in a vacuum. After hearing that counsel told a witness his client would lose the case, a reasonable juror would certainly conclude that, when that attorney discussed a guilty plea with his client, he was

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[6] Respondent's interpretation is unlikely. The word *also* suggests that the blind plea they are discussing is in addition to something else. If they were only talking about one plea (Perez's), the use of *also* would be nonsensical.

referring to his client entering that plea.

When taken for the truth, these statements operate as admissions of guilt by Petitioner's own attorney. The statements and the inferences the jury likely drew from them—inferences the government itself drew in front of the jury—were incredibly prejudicial. Any juror that took these statements for their truth would necessarily disregard Petitioner's closing argument and could have convicted based on the statements alone.

2. Respondent overstates the strength of its case.

In assessing the strength of the government's evidence, the goal is not to determine whether the evidence makes it likely that the defendant was guilty, nor even to determine whether the evidence shows beyond a reasonable doubt that the defendant was guilty. The goal is to determine whether the evidence goes so far above proof beyond a reasonable doubt that the Court can say with fair assurance that the particularly pernicious error at issue did not influence the jury's verdict.

Respondent's analysis of the government's evidence reflects an insistence on viewing the evidence in the light most favorable to the government.[7] This failure to recognize the proper allocation of the burden of proof is also evident in

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[7] This is similar to the majority's analysis, which credited Cruz's testimony without even mentioning the powerful attacks on his credibility. Respondent now admits that Cruz's testimony could have been reasonably disregarded. Resp. Br. 43.

Respondent's excessive reliance on drawing general inferences from circumstantial evidence in favor of the government.

Respondent's analysis of the phone records attempts to present the evidence in the light most favorable to the government. According to Respondent, the phone records "strongly suggested that Perez kept Petitioner informed" of the drug deal's progress. Resp. 39. Respondent points out that between 4:26 on August 4 (when Diaz contacted Cruz) and 5:30 on August 5, Petitioner and Perez exchanged 38 calls. *Id.* Respondent fails to point out that Perez and Petitioner, close friends and cousins, spoke frequently, and exchanged more calls on days before Perez knew of the cocaine deal. With no drug deal to discuss, Perez and Petitioner exchanged *47* telephone calls on August 2 and *41* on August 3. J.A. 659. Thus, Respondent asks this Court to draw the inference most favorable to a finding of guilt despite contrary evidence in the record.

Respondent also indicates that calls between Cruz and Perez "were followed within minutes by a phone conversation between Perez and [Petitioner]." Resp. 39. This is inaccurate; after Cruz first discussed the deal with Perez, J.A. 754, Perez made 19 calls to various persons before speaking to Petitioner over an hour later. *Id.* The conversations between Cruz and Perez continued to be followed by calls to persons other than Petitioner. J.A. 755-57. Put simply, Respondent puts far more weight on the phone records than they can credibly bear.

Respondent's analysis also relies heavily on circumstantial evidence such as flight evidence and prior crimes evidence. Because of the dangers of placing too much emphasis on these forms

circumstantial evidence, this Court has always focused on more direct, fact-specific evidence of guilt when finding an error harmless—evidence not present in this case. See *Harrington*, 395 U.S at 354 (noting that the case against defendant "was not woven from circumstantial evidence"); See also *Milton*, 407 U.S. at 372 (noting that the defendant confessed four times); *Schneble v. Florida*, 405 U.S. 427, 430-431 (1972) (noting that defendant gave minutely detailed confession).

Respondent suggests that Petitioner's flight demonstrated his guilt, but also admits that this Court views flight evidence skeptically. Resp. 41-43. Respondent claims that an innocent parolee would simply "surrender to sort matters out with law enforcement," Resp. 42. However, Petitioner was not faced with officers calmly asking him to answer questions, but with multiple officers running at him, pointing guns, and slamming into the vehicle. J.A. 126-28.

A parolee could easily panic and try to escape when confronted by the intense situation facing Petitioner. The district court instructed the jury to consider whether feelings of guilt illustrated by flight came from "the crime charged in this case or from some other concern, and whether the flight gives any actual insight into whether the defendant committed the charged crime." J.A. 725. Since Petitioner had reason to panic even without knowledge of the drug transaction, a rational jury could have followed the instruction and determined the flight evidence inconclusive.

This is the prototypical issue that a jury is uniquely positioned to resolve. While lawyers and judges may think it unwise to flee from law

enforcement to avoid parole revocation, members of the community, using "the common sense judgment of a group of laymen," *Williams v. Florida*, 399 U.S. 78, 100 (1970), might feel differently. Additionally, Respondent wholly failed to address the flight instruction or the significant dispute concerning the details of the flight evidence, J.A. 664-68, thus demonstrating the evidence's limited value.

Like the flight evidence, the prior-crime evidence is general circumstantial evidence that has little to do with the charged crime. Respondent claims that the prior-crime evidence "forcefully undercuts" Petitioner's defense. Resp. 42-43. The government's burden in harmless-error analysis is not to undercut the defense, but to show that its own evidence was so persuasive that the jury would not have been influenced by the error. The scant similarities between the prior crime and the charged offense do not provide strong proof of Petitioner's knowledge, especially when juxtaposed with the stark differences between his behavior during the prior transaction and his behavior in this case, as well as the fact that the earlier transaction took place *six years* prior. See J.A, 321-23, 241-49.

The real persuasive force behind the other-crimes evidence comes from the impermissible use of that evidence to show criminal propensity. The jury was instructed not to consider the evidence for that purpose, J.A. 722, and is presumed to have followed that instruction. Once that prejudicial taint is removed, this six-year-old conviction provides little insight into Petitioner's knowledge in this case.

3. The defense presented a plausible theory of innocence through Marina Perez's testimony.

Respondent has not disputed that, if believed, Marina Perez's testimony would have compelled any reasonable juror to acquit. Thus, Respondent is forced to attack her testimony in order to salvage the claim that the government case was very strong. The government's attacks on Mrs. Perez's testimony amount to three claims: (1) she was biased, (2) she believed Petitioner was guilty, and (3) her testimony was implausible. However, these arguments fail to consider the entirety of the record and instead assume, without proof, that the jury drew every inference in favor of the government.

Respondent's bias argument is that Mrs. Perez believed Petitioner's attorney could help her husband get a lower sentence. But believing that an attorney has good ideas for sentencing is a far cry from committing perjury in the hope of obtaining his assistance. This theory of bias is also undercut by Mrs. Perez's obvious animosity toward defense counsel. J.A. 542. This sort of credibility determination is one a jury is uniquely positioned to make. Only by viewing the evidence in the light most favorable to the government can Respondent ask this Court to disregard her testimony on the basis of a credibility determination made from a cold record.

Respondent's claim that the calls show that Mrs. Perez believed Petitioner guilty relies on an idealized version of the evidence that the jury never heard. Respondent argues that Mrs. Perez told her husband that she believed that "[Petitioner] faced

the same likelihood of conviction as did Perez." Resp. 44. Neither cited call supports this proposition. The call at J.A. 766 involved Mrs. Perez stating that, if *merely going to the scene* makes you guilty, Petitioner was guilty too. J.A. 765-766. The call at J.A. 777 does not mention any belief about Petitioner's guilt. Thus, based on the language of the calls the jury actually heard, it is unlikely they reached the conclusion Respondent urges.

The remainder of Respondent's arguments regarding Mrs. Perez's testimony amount to the assertion that her testimony was not "plausible." For instance, Respondent argues that Mrs. Perez's testimony was unbelievable because it "ma[de] little sense" that her husband asked her to drive the Bonneville containing $23,000 to Arlington Heights. Resp. 44-45. This argument fails to recognize Cruz's testimony that no money would be exchanged at the meeting. J.A. 188-89. Moreover, it is a clear attempt to ask this Court to step into the role of the jury. The likelihood that an individual would ask his wife to pick him up from a drug deal is a question for a jury. A harmless-error finding cannot be based on a Court's determination, on a cold record, about whether an individual is the kind of person who would ask his spouse to pick him up from a drug deal. A reviewing court is in no position to make that assessment.

Respondent also focused on Mrs. Perez's testimony that Perez left Petitioner's residence with an unknown individual around 4:00 and was picked up by Cruz approximately one hour later. According to Respondent, this itinerary "makes little sense." Resp. 45. It is unclear why this itinerary does not make sense. It would simply mean Mr. Perez did

something else before Cruz picked him up. Respondent's attempt to parse every detail of the case does not establish the kind of strong evidence that would encourage a jury not to base its verdict on the erroneously-admitted statements that Petitioner's counsel thought he was guilty.

Respondent again gets lost in the minutiae of the testimony when it argues that it is "inherently implausible" that Petitioner would have driven to Arlington Heights without knowing the precise location of the pick-up. Resp. 45 (citing J.A. 593). This argument is based on the assertion that the ""informant did not tell Cruz and Perez about the Shell-station meeting point until they had already arrived next to the station." *Id.* But this assertion is inconsistent with the record. Agent Chupik testified that, on the "morning" of August 5, Diaz placed a call where he was instructed to tell "Cruz and his customers to meet us at the Shell gas station . . . in Arlington Heights." J.A. 40. Thus, Diaz had already told Cruz the location. That explains why the government never made this argument at trial. J.A. 710-716. The argument exemplifies the dangers of improper harmless-error analysis. If courts rely on entirely new arguments thought up by appellate lawyers—rather than on what actually happened at trial—they are displacing the jury's judgment of the evidence with their own interpretations.

The government's analysis is completely one-sided, overlooking, for example, that Mrs. Perez's testimony was entirely consistent with the phone records evidence.[8] Instead of considering the entire

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[8] Phone records show Perez/Petitioner calls before 3:30 but none between 3:30 and 4:00 when she testified they were together. They also show calls from Petitioner to Perez at 4:08

record, Respondent has focused on minor and illusory claims of implausibility. The government's response to Mrs. Perez's testimony belies Petitioner's claims of implausibility. If her testimony was "exceedingly implausible," Resp. 44, there would have been no need for the government to scour hours of jail calls over the weekend to try to rebut it. This reaction and the significant time spent addressing her testimony in argument show that trial counsel believed her testimony was both plausible and important. J.A 644-46, 710-17.

Respondent's entire argument regarding Mrs. Perez's testimony smacks of burden-shifting. It was not Petitioner's obligation to prove Mrs. Perez's testimony truthful; it was the government's burden to prove that she was lying. The question is not whether aspects of her testimony are "implausible" in Respondent's opinion. The question is whether the evidence disproved her account beyond a reasonable doubt, and whether it did so in such an overwhelming fashion that the uniquely prejudicial error here had no effect.

Finally, the split verdict demonstrates that the government's evidence was not sufficiently strong to neutralize the error. Respondent argues that the split verdict resulted from jury confusion about the definition of "substantial step." Resp. 35. However, the jury never heard this argument. In closing, the government argued that it was a foregone conclusion that a conviction on conspiracy entailed a conviction on attempt. J.A. 642 ("All of the evidence we've just discussed, not only goes to the conspiracy charge ... but it also goes to ... the attempt charge"). Similarly,

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and 5:05, when she testified Petitioner called Perez and left to get him. J.A. 756-57, 436, 438, 446.

Petitioner never argued the absence of a substantial step. J.A. 20. Both sides treated the case as if the verdict would be the same on both counts. The question is not what creative explanations for a jury's verdict can be concocted on appeal, but what the jury likely did with the information and arguments before it. There is no reason to believe that the jury based its verdict on an argument it never heard.

In light of the evidence the jury heard, the error at issue was highly prejudicial; the government's case was not particularly strong, and the defense presented a witness that, if believed, would have required the jury to acquit. In these circumstances, the government cannot establish that there is a fair assurance that the error did not influence the jury's verdict.

CONCLUSION

Petitioner's conviction should be reversed.

Respectfully submitted,

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March 12, 2012

AMICUS CURIAE BRIEF

No. 11-199

In The
Supreme Court of the United States

ALEXANDER VASQUEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

AMICUS CURIAE BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER AND URGING REVERSAL

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QUESTIONS PRESENTED

1. Did the Seventh Circuit violate this Court's precedent on harmless error when it focused its harmless error analysis solely on the weight of the untainted evidence without considering the potential effect of the error (the erroneous admission of trial counsel's statements that his client would lose the case and should plead guilty for their truth) on this jury at all?

2. Did the Seventh Circuit violate Mr. Vasquez's Sixth Amendment right to a jury trial by determining that Mr. Vasquez should have been convicted without considering the effects of the district court's error on the jury that heard the case?

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INTEREST OF AMICUS CURIAE[1]

Amicus National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.

NACDL was founded in 1958. It has a nationwide membership of 11,000 and an affiliate membership of almost 40,000. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in its House of delegates.

NACDL files numerous amicus briefs each year in this Court and other courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. Of particular significance here, NACDL has submitted a number of briefs in this Court defending the Sixth Amendment right to jury trial, including in *Sullivan v. Louisiana*, 508 U.S.

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[1] Under Sup. Ct. R. 37.6, counsel for amicus curiae state that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court under Rule 37.2(a).

275 (1993), a seminal harmless error decision that bears heavily on this case.

SUMMARY OF ARGUMENT

1. The Sixth Amendment guarantees the right to trial by jury for serious crimes. The jury trial right bars federal judges from making independent determinations of a defendant's guilt. At the same time, Congress and the Court long ago determined that inconsequential errors found on appeal should not necessitate the expenditure of resources that a retrial entails or the societal cost of freeing a person determined by a jury to have committed a crime. The Court has accommodated both the absolute Sixth Amendment jury trial right and the interest in avoiding unnecessary reversals by insisting that harmless error review focus on the effect of the error on the verdict rendered, rather than on the verdict a hypothetical jury would have rendered in an error-free trial.

2. This Court has recognized two requirements for a harmless error methodology that honors the Sixth Amendment jury trial right. First, the appellate court must search the entire record for objective indications that the error did (or did not) affect the verdict actually rendered. Second, even for nonconstitutional errors the government must bear the burden of demonstrating harmlessness.

3. In scouring the record for objective indications of the error's effect, an appellate court may take into account the strength of the evidence of guilt untainted by the error. But for reasons of

institutional competence and constitutional allocation of factfinding responsibility in criminal cases, appellate judges must view the evidence in the light most favorable to the defense. An appellate court conducting harmless error review must not draw inferences and make credibility determinations in the government's favor; it must consider the entire record and not merely the prosecution's evidence; and it must focus on the effect of the error on the verdict, and not on the different question of whether the properly admitted evidence is sufficient to support the verdict.

4. The court of appeals majority in this case applied a harmless error methodology that trenches upon petitioner's Sixth Amendment right to trial by jury. The majority failed to scour the record for indicia of the error's effect on the jury; it drew inferences and made credibility determinations in favor of the prosecution, rather than viewing the evidence in the light most favorable to the defense; and it focused on the prosecution case and did not consider the entire record. Under a harmless error review that honors petitioner's right to have his guilt determined by a jury, reversal is required.

ARGUMENT

I. TO SAFEGUARD THE SIXTH AMENDMENT JURY TRIAL RIGHT, THIS COURT HOLDS THAT HARMLESS ERROR REVIEW MUST ASSESS THE EFFECT OF THE ERROR ON THE VERDICT ACTUALLY RENDERED.

The Sixth Amendment guarantees the right to trial by jury for serious crimes. The jury trial right bars federal judges from making independent determinations of a defendant's guilt. "[A]lthough a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the State, no matter how overwhelming the evidence." *Sullivan v. Louisiana*, 508 U.S. 508 U.S. 275, 277 (1993). The right to a jury trial "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary." *Blakely v. Washington*, 542 U.S. 296, 305-06 2004); *see United States v. Gaudin*, 515 U.S. 506, 510-11 (1995).

At the same time, Congress and the Court long ago determined that inconsequential errors found on appeal should not necessitate the expenditure of resources that a retrial entails or the societal cost of freeing a person determined by a jury to have committed a crime. *See, e.g.,* 28 U.S.C. § 2111; Fed. R. Crim. P. 52(a); *Kotteakos v. United States*, 328 U.S. 750, 757-59 (1946); *Bruno v. United*

States, 308 U.S. 287, 294 (1939). The Court has thus determined that most errors--even constitutional errors--are subject to harmless error analysis, and that errors found to be harmless do not require reversal of a conviction. *See, e.g., Arizona v. Fulminante*, 499 U.S. 279, 306-12 (1991).

The Court has accommodated both the absolute jury trial right and the interest in avoiding the societal cost of unnecessary reversals by insisting that harmless error review focus on the effect of the error on the verdict rendered, rather than the verdict a hypothetical jury would have rendered in an error-free trial. As a unanimous Court explained in *Sullivan*:

> The inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered--no matter how inescapable the findings to support that verdict might be--would violate the jury-trial guarantee.

508 U.S. at 279 (emphasis in original). The Court added: "The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty." *Id.* at 280; *see, e.g., Kotteakos*, 328

U.S. at 763-64 ("[I]it is not the appellate court's function to determine guilt or innocence. Nor is it to speculate upon probable reconviction and decide according to how the speculation comes out."); *id.* at 764 ("[T]he question is, not were [the jurors] right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting.").[2]

The challenge for an appellate court, as *Sullivan* suggests, is to identify those errors which had no effect on the jury's verdict without the court substituting itself for the factfinder in violation of the Sixth Amendment. The difficulty in determining an error's effect on the "guilty verdict actually rendered" is particularly acute because of the entrenched policy, embodied in Fed. R. Evid. 606(b), against inquiring into jurors' deliberations. The ban on evidence of deliberations in Rule 606(b) means

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[2] In *Neder v. United States*, 527 U.S. 1 (1999), the Court arguably deviated from the insistence in *Sullivan* and *Kotteakos* on preserving the jury's role in finding guilt. But *Neder* must be seen in light of its extraordinary facts. As the five-Justice majority took pains to point out, the petitioner in *Neder* did not contest the element at issue (materiality in a false tax return prosecution), and the evidence ($5 million in omitted income) established it beyond a shadow of a doubt. *See id.* at 16-17. Indeed, Justice Stevens, concurring in the judgment, concluded that the jury necessarily found the element of materiality in finding that the defendant omitted the income from the return. *See id.* at 26 (Stevens, J., concurring). In our view, *Neder* should be overruled, for the reasons stated in the dissent. *See id.* at 30-40 (Scalia, J., dissenting, joined by Souter & Ginsburg, JJ.) At a minimum the decision should be limited to its unique facts.

that any assessment of the impact of an error on the jury must rely on circumstantial rather than direct evidence of the error's effect.

II. THE COURT'S HARMLESS ERROR METHODOLOGY REQUIRES CONSIDERATION OF THE ENTIRE RECORD, WITH THE BURDEN OF PROOF ON THE GOVERNMENT.

This Court has recognized two components to a harmless error methodology that honors the Sixth Amendment jury trial right. First, the appellate court must search the entire record for objective indications that the error did (or did not) affect the verdict. Second, even for nonconstitutional errors the government must bear the burden of demonstrating harmlessness.[3] If the appellate court is left in doubt about the effect of the error after examining the entire record, it must reverse. Only strict compliance with both components ensures that a finding of harmless error on appeal will not effectively substitute the appellate judges' factfinding for the jury's verdict.

A. The Appellate Court Must Search the Entire Record for Indications of the Effect of the Error.

To determine the effect of the error on the jury's verdict, the appellate court must scour the record for objective indications of the error's impact.

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[3] It is settled, of course, that the government must prove the harmlessness of constitutional errors beyond a reasonable doubt. *See, e.g., Chapman v. California*, 386 U.S. 18 (1967).

Those indicia may vary depending on the type of error. For example, this Court has identified several non-exclusive factors to consider in determining whether an error in restricting cross-examination is harmless, including "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986). To cite another example, when a jury receives an erroneous supplemental instruction and then convicts, this Court has considered evidence of the jury's confusion on the point at issue and the length of deliberations before and after the erroneous instruction in assessing harmlessness. *See Bollenbach v. United States*, 326 U.S. 607, 611-14 (1946).

When (as here) the error involves the improper admission of evidence, this Court and the courts of appeals have found that indications of the error's effect on the verdict may include the following circumstances (among others):

- The prosecution's reference to the improper evidence in opening and closing, *see, e.g.*, *Fulminante*, 499 U.S. at 297-98; *Satterwhite v. Texas*, 486 U.S. 249, 260 (1988); *Chapman v. California*, 386 U.S. 18, 25 (1967);

- the prosecution's use of the evidence at trial (for example, in questioning prosecution witnesses, cross-examining defense witnesses, or obtaining the introduction of other evidence), *see, e.g., id.* at 300; *Fahy v. Connecticut*, 375 U.S. 85, 88-89 (1963);

- the inflammatory (or innocuous) nature of the improperly admitted evidence, *see, e.g., Fulminante*, 499 U.S. at 296-97;

- the effect of the improperly admitted evidence on the conduct of the defense, *see id.* at 91;

- the length and difficulty of jury deliberations, *see, e.g., Krulewitch v. United States*, 336 U.S. 440, 444-45 (1949);[4]

- statements the trial attorneys or the trial judge made about the importance of the evidence, *see, e.g., Fulminante*, 499 U.S. at 297;

- the strength of the properly admitted evidence (discussed in more detail in Part III below); and

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[4] *See also, e.g., United States v. Varoudakis*, 233 F.3d 113, 126 (1st Cir. 2000) (longer jury deliberations "weigh against a finding of harmless error," because "[l]engthy deliberations suggest a difficult case"); *Gibson v. Clanon*, 633 F.2d 851, 855 (9th Cir. 1980) ("The state's case against [the defendants] is a strong one. Nevertheless, if the jury had readily accepted [the] eyewitness testimony, it seems unlikely they would have deliberated so long to reach a verdict.").

- the results of previous trials in the same matter, *e.g.*, *Krulewitch*, 336 U.S. at 445, particularly when the improperly admitted evidence marks a difference between a first trial that produced a hung jury and a retrial that produced a conviction, *see, e.g.*, *Kennedy v. Lockyer*, 379 F.3d 1041, 1056 & n.18 (9th Cir. 2004) (gang testimony was excluded at first trial, which resulted in mistrial, and admitted at the second trial, which resulted in conviction; court concludes that error in admitting the evidence was prejudicial).

Other circumstances as well may bear on whether the error affected the verdict that the jury returned. The critical point is that the appellate court must search the *entire* record for *any* indication that the error affected the verdict.

B. The Government Has the Burden of Proving Harmlessness.

After a close examination of the entire record, the appellate court may be unsure whether the error affected the verdict. In such cases, the court should reverse the conviction. Put differently, the risk of non-persuasion rests on the government; if it cannot show, based on the record, that the error did not affect the verdict, both the Sixth Amendment jury trial right and the underlying right at issue require reversal and a new trial at which a jury untainted by the error can determine the defendant's guilt. As this Court has explained, the inquiry is "whether the error itself had substantial influence [on the verdict].

If so, *or if one is left in grave doubt*, the conviction cannot stand." *Kotteakos*, 328 U.S. at 765 (emphasis added); *see, e.g., O'Neal v. McAninch*, 513 U.S. 432, 436 (1995) (adopting same approach in habeas context); *see also United States v. Olano*, 507 U.S. 725, 741 (1993) (under Fed. R. Crim. P. 52(a), the government "bears the burden of showing the absence of prejudice").

III. THE APPELLATE COURT MUST ASSESS THE STRENGTH OF THE EVIDENCE WITH DUE CONSIDERATION FOR THE JURY'S ROLE AS FACTFINDER.

In scouring the record for objective indications of the error's effect--and thus determining whether the government has established harmlessness--an appellate court may take into account the strength of the evidence of guilt untainted by the error. But for two reasons--one practical and one a matter of constitutional command--appellate judges conducting harmless error review must view the evidence in the light most favorable to the defense.

The practical reason for this approach is simple: appellate judges, unlike jurors, are not in the courtroom when the evidence is presented. Appellate judges thus cannot observe "the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985). They cannot observe shifty eyes, or nervous swiveling, or a flushed face, or a sweaty brow. Nor can appellate judges reading a transcript understand the courtroom dynamics that affect credibility

determinations. A muttered sentence that draws derisive snickers from the jury has the same weight in a transcript as a confident assertion that draws nods of agreement. Even a document may have a strikingly different effect when presented to a jury in the courtroom through a sponsoring witness than when reviewed in the cloister of an appellate judge's chambers. Appellate judges who attempt to assess the weight to be given a witness' testimony or the significance to be afforded a particular document engage in a task they lack the institutional competence to perform.

The constitutional reason to view the evidence in the light most favorable to the defense is equally simple: the Sixth Amendment categorically assigns the factfinding function to the jury, rather than to judges--"a fundamental reservation of power in our constitutional structure." *Blakely*, 542 U.S. at 306. Appellate judges

> are not authorized to look at the printed record, resolve conflicting evidence, and reach the conclusion that the error was harmless because we think the defendant was guilty. That would be to substitute our judgment for that of the jury and, under our system of justice, juries alone have been entrusted with that responsibility.

Weiler v. United States, 323 U.S. 606, 611 (1945). In light of this constitutional allocation of responsibility, appellate judges may not weigh the evidence

and make their own assessments of credibility and probative value.

These restrictions on judicial factfinding, and especially on *appellate* factfinding, produce three related principles that must guide appellate judges in assessing the evidence as part of harmless error review.

First, unlike when determining sufficiency of the evidence, *e.g.*, *Jackson v. Virginia*, 443 U.S. 307 (1979), appellate judges making harmless error assessments may not view the evidence in the light most favorable to the prosecution, *see, e.g.*, *United States v. Hands*, 184 F.3d 1322, 1330 n.23 (11th Cir. 1999). Thus, for example, appellate judges may not make credibility determinations or draw inferences in the government's favor. To the contrary, appellate judges must recognize the possibility that jurors may disbelieve a prosecution witness because of impeachment, the witness' demeanor, or the inherent implausibility of the witness' testimony. *See, e.g.*, *Fulminante*, 499 U.S. at 298-99; *United States v. Kaiser*, 609 F.3d 556, 567 (2d Cir. 2010) (error prejudicial where government's case relied on cooperators, whose credibility the jury had "ample reason . . . to question"); *cf. Van Arsdall*, 475 U.S. at 684 (in assessing whether erroneous limitation of cross-examination is harmless, court must "assum[e] that the damaging potential of the cross-examination were fully realized").[5]

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[5] *See also, e.g.*, *United States v. Manning*, 23 F.3d 570, 575 (1st Cir. 1994) (given that prosecution and defense witnesses both "gave a plausible account," neither of which was "*inherently* unlikely to be true . . . and given the further fact that we are

To protect the Sixth Amendment jury trial right, appellate judges assessing the strength of the evidence for harmless error purposes should afford the defendant the benefit of the doubt in much the way they do in assessing the sufficiency of the evidence to support a defense jury instruction. *See, e.g., Mathews v. United States*, 485 U.S. 58, 63 (1988). As the Ninth Circuit has explained,

> [A] defendant is entitled to an instruction concerning his theory of the case if the theory is legally sound and evidence in the case makes it applicable, even if the evidence is weak, insufficient, inconsistent, or of doubtful credibility. A defendant needs to show only that there is evidence upon which the jury could rationally sustain the defense. Where, as here, factual disputes are raised, this standard protects the defendant's right to have questions of evidentiary weight and credibility resolved by the jury.

United States v. Kayser, 488 F.3d 1070, 1076 (9th Cir. 2007) (quotations and citations omitted). In assessing the evidence for harmless error purposes, appellate courts likewise should view the evidence in the defendant's favor to the extent the jury rationally could have done so.

(continued...)

precluded from making independent credibility determinations on appeal," error cannot be found harmless (emphasis in original)).

Second, and relatedly, appellate judges must examine "the record as a whole," not merely those portions that favor the government. *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993); *see, e.g., Krulewitch*, 336 U.S. at 444-45 (considering entire record and finding that erroneous admission of hearsay was not harmless); *Kotteakos*, 328 U.S. at 764 (harmless error inquiry "must take account of what the error meant to [the jurors], not singled out and standing alone, but in relation to all else that happened").[6] The record as a whole includes evidence the defense elicits on cross-examination of government witnesses and evidence the defense presents in its case.

Third, the inquiry is not "merely whether there was enough [evidence] to support the result apart from the phase affected by the error." *Kotteakos*, 328 U.S. at 765; *see id.* at 767 (rejecting argument that error is harmless "if the evidence offered specifically and properly to convict [the] defendant would be sufficient to sustain his conviction" absent the error). The question instead is whether, in light of the entire record, including the strength of the evidence, the government has established that the error did not affect the jury's verdict. *See Satterwhite*, 486 U.S. at 258-59 ("The

[6] *See also, e.g., Hands*, 184 F.3d at 1329 ("We determine whether an error had substantial influence on the outcome by weighing the record as a whole . . . ."); *Taylor v. United States*, 414 F.2d 1142, 1144-45 (D.C. Cir. 1969) (rejecting government contention that on harmless error review the court should view the evidence in the light most favorable to the government; harmless error analysis requires court to "look to all the evidence, defense and prosecution alike, and bring our judgment to bear upon the question of whether it is clear to us" that the error was harmless).

question, however, is not whether the legally admitted evidence was sufficient to support the death sentence, which we assume it was, but rather, whether the State has proved beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (quotation omitted)); *Fahy*, 375 U.S. at 86 ("We are not concerned here with whether there was sufficient evidence on which petitioner could have been convicted without the evidence complained of.").

IV. THE COURT OF APPEALS' HARMLESS ERROR APPROACH IGNORED THIS COURT'S METHODOLOGY AND VIOLATED PETITIONER'S SIXTH AMENDMENT JURY TRIAL RIGHT.

For the reasons outlined at pages 44-63 of the petitioner's brief, the court of appeals majority applied a harmless error methodology that violates the principles outlined above and trenches upon petitioner's Sixth Amendment right to trial by jury. The majority failed to scour the record for indicia of the error's effect on the jury; it drew inferences and made credibility determinations in favor of the prosecution, rather than viewing the record in the light most favorable to the defense; and it focused on the prosecution case and did not consider the entire record. Upon an assessment that honors petitioner's right to have his guilt determined by a jury rather than by appellate judges, the error in admitting evidence of his lawyer's opinion that he would be convicted cannot be deemed harmless.

CONCLUSION

The conviction should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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AND
BRIEFS

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No. 11-199

IN THE
Supreme Court of the United States

ALEXANDER VASQUEZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF JEFFREY K. SKILLING AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

This brief addresses the following question encompassed by the petition for a writ of certiorari:

Whether an error can be deemed harmless, consistent with *Neder v. U.S.*, 527 U.S. 1 (1999), and the Sixth Amendment, on the basis of a determination that the government's evidence of guilt is "overwhelming," even when the jury reasonably could have acquitted the defendant without the error.

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BRIEF OF JEFFREY K. SKILLING AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

This brief is submitted on behalf of Jeffrey K. Skilling in support of petitioner.[1]

INTEREST OF AMICUS CURIAE

Skilling has a direct interest in the correct analysis of harmless error, as detailed in his own pending petition for a writ of certiorari raising closely related harmless-error questions. *See Skilling v. U.S.*, No. 11-674, filed Nov. 28, 2011 ("*Skilling* Pet.").

As elaborated further in his petition—and in this Court's own prior opinion in *Skilling v. U.S.*, 130 S. Ct. 2896 (2010)—Skilling was convicted of alleged frauds at Enron Corporation in a case involving alternative theories of guilt. The heart of the government's case was a conspiracy count alleging multiple objects, including "honest services" fraud and securities fraud. The jury convicted on 19 of 28 counts in a "general verdict" form, i.e., without specifying whether jurors found Skilling guilty of conspiracy on the honest-services object, or the securities-fraud object, or both.

In *Skilling*, this Court concluded unanimously that the "honest services" object was invalid as applied to Skilling. But rather than reverse the conviction, the Court remanded to the Fifth Circuit to determine whether the government could establish

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[1] No counsel for any party has authored this brief in whole or in part, and no person other than *amicus* or his counsel have made any monetary contribution intended to fund the preparation or submission of this brief. The parties' letters consenting to the filing of this brief have been filed concurrently herewith.

that inclusion of the invalid object was harmless beyond a reasonable doubt.

The Fifth Circuit, however, misconstrued the harmless-error standard enunciated by this Court in *Neder v. U.S.*, 527 U.S. 1 (1999), and thereby found the honest-services fraud error harmless based merely on the strength of the government's case, with little or no regard for the challenge to that case mounted by Skilling's defense. *Skilling* Pet. 23-24, 27-31. The court even held that Skilling's own extensive testimony in his own defense was immaterial to the harmless-error inquiry, and it therefore categorically excluded all consideration of that testimony from the analysis. *Id.* at 24, 34-37.

As Skilling's petition argues, the Fifth Circuit's analysis reflects a deep and abiding misunderstanding of the harmless-error inquiry mandated by *Neder*, as applied to the alternative-theory context. The fundamental harmless-error questions presented in Skilling's petition overlap substantially with the questions presented in this case, and thus the Court's decision here could well affect the issues raised by Skilling. Skilling accordingly has a direct and substantial interest in the harmless-error issues presented here.

INTRODUCTION AND SUMMARY OF ARGUMENT

The question presented in this case is whether an appellate court conducting harmless-error analysis should consider only the weight of the evidence absent the error, or whether it should also consider the effect of the particular error on the particular jury. Pet. i. The Seventh Circuit below—similar to the

Fifth Circuit in Skilling's case—opted for the former approach, finding a trial error harmless because, in its view, "although the issue is close," the evidence of the defendant's guilt was strong enough to "move[] the jury to convict Vasquez" absent the error. Pet. App. 15A-18A; *see also Skilling* Pet. 23-24.

There are strong arguments that harmless-error analysis should or must consider the subjective, prejudicial effect of the actual error on the actual jury. *See, e.g.*, *Sullivan v. Louisiana*, 508 U.S. 275, 279-80 (1993); Pet. Br. 11-43. This brief, however, assumes that this Court's *Neder* decision supplanted the *Sullivan* approach, such that harmless-error analysis is only an objective assessment of how an error could have affected a reasonable jury, given the full record of the case. Even on that view, the court below, like the Fifth Circuit in Skilling's case, fundamentally erred in finding the respective errors in those cases harmless. The relevant question is not, as those courts believed, whether the government's evidence is sufficiently strong to convince the appellate court of the defendant's guilt. Rather, an appellate court is precluded from finding a trial error harmless—even when the government's case is "overwhelming," *Skilling* Pet. 24—unless, absent the error, there is no triable issue of fact for the jury to resolve not already necessarily resolved in the original finding of guilt. That approach is dictated by this Court's decision in *Neder*, and by the fundamental guarantees of the Sixth Amendment. And under the proper analysis, both the decision below, and the Fifth Circuit's decision in Skilling's case, must be reversed.

ARGUMENT

I. *NEDER* PRECLUDES A FINDING OF HARMLESSNESS WHEN THE RECORD INCLUDES EVIDENCE SUFFICIENT FOR A RATIONAL JURY TO ACQUIT ABSENT THE TRIAL ERROR

This Court held in *Neder* that the erroneous omission of an element from the jury charge is subject to harmless-error review, even though a finding of harmlessness in those circumstances would affirm a conviction without the jury ever having found one of the elements of the crime beyond a reasonable doubt. The Court reconciled that holding with the Sixth Amendment's fundamental jury-trial right by explaining that harmless error can only be found when—as in *Neder*—the omitted element was uncontested, and, thus, no reasonable jury that voted to convict with the error could have voted to acquit without it. *Neder* thus makes clear that, contrary to the approach of the Seventh Circuit below, the Fifth Circuit in Skilling's case, and many other courts, an error cannot be deemed harmless simply because the appellate court believes the government's case to be strong. If a triable issue of fact concerning the defendant's guilt, not already necessarily resolved by the jury's original verdict, remains absent the error, then the error cannot, consistent with the Sixth Amendment and this Court's precedent, be considered harmless.

A. *Neder* Establishes That An Error Cannot Be Deemed Harmless Merely Based On "Overwhelming" Government Evidence, If A Triable Issue Of Fact Remains Concerning The Defendant's Guilt

If this Court rejects the approach to harmless error analysis described in *Sullivan* and pressed by the petitioner, and instead holds that harmless-error analysis should be based on an objective view of the record evidence, then the analysis is controlled by this Court's opinion in *Neder*. A constitutional error is harmless, *Neder* explains, only when it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." 527 U.S. at 18. Thus, in *Neder*, the question was whether it was clear that the jury would have found the defendant guilty if the omitted element had been included.

In considering how to approach this harmless-error question, the *Neder* Court sought to strike "an appropriate balance between 'society's interest in punishing the guilty [and] the method by which decisions of guilt are to be made.'" 527 U.S. at 18 (alteration in original) (quoting *Connecticut v. Johnson*, 460 U.S. 73, 86 (1983) (plurality opinion)). *Neder* explains that the government's interest in determining the defendant's guilt or innocence must be weighed against the fundamental right to have a jury, rather than a judge—or three judges—decide a criminal defendant's guilt. The right to a jury determination of guilt "was designed 'to guard against a spirit of oppression and tyranny on the part of rulers,'" and "'was from very early times insisted on by our ancestors in the parent country, as the great

bulwark of their civil and political liberties.'" *Id.* at 19 (quoting *U.S. v. Gaudin*, 515 U.S. 506, 510-15 (1995), in turn quoting 2 J. Story, Commentaries on the Constitution of the United States 540-541 (4th ed. 1873)).

Neder strikes this balance by holding that an error may be deemed harmless only when no rational juror who voted to convict in the original trial could have acquitted absent the error, based on the record as a whole. Because jurors are presumed rational (absent evidence to the contrary), a trial error cannot be said to have affected the guilt determination if only one outcome—guilt—would have been rational absent the error. As *Neder* explains, the omission of an element is not harmless if "the record contains evidence that *could rationally* lead to a contrary finding with respect to the omitted element." *Id.* at 19 (emphasis added). By contrast, "where an omitted element is supported by uncontroverted evidence," such that the jury could not rationally have acquitted on the element, the jury-trial right remains secure. *Id.* at 18; *see also id.* at 17 (omission of element harmless because element "was uncontested and supported by overwhelming evidence"); *id.* at 19 (error is harmless "where a defendant did not, and ... could not, bring forth facts contesting the omitted element"). But "where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding" by a rational jury, the right to a jury determination on that element precludes the reviewing court from deeming the error harmless. *Id.* at 19.

Accordingly, the question on harmless error review cannot be simply whether the government's

case against the defendant, in the court of appeals' view, was strong, or even "overwhelming." Although the strength of the government's evidence is certainly relevant—e.g., a weak prosecution case alone could preclude a finding of harmlessness—what really matters is whether the trial record as a whole, without the error, provided *any rational basis for the jury to reach a different conclusion as to the defendant's guilt*. If it is not clear that the verdict would have been the same absent the error because a triable question of fact about the defendant's guilt remains, a trial error cannot be considered harmless, because the jury—not the appellate court—must be the entity to answer that triable question. *Neder*, 527 U.S. at 18-19.[2]

This approach was reaffirmed by the Court in *Mitchell v. Esparza*, 540 U.S. 12 (2003). The question in *Mitchell* was whether a charging error—which allowed a defendant convicted of aggravated murder to be eligible for the death penalty even

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[2] To be sure, an error can sometimes be considered harmless when a triable issue of fact theoretically exists without the error, but the original jury verdict demonstrates that the jury has already resolved the question against the defendant. For example, when the facts of the case and the jury's verdict demonstrate that the jury necessarily found facts that could only have rationally led to a guilty verdict, regardless of the error, an error may be deemed harmless, *see, e.g.*, *Sullivan*, 508 U.S. at 281, even if the evidence at trial was otherwise contested. Similarly, if the error results in the exclusion of cumulative evidence, such that there is no plausible basis to suppose that the jury originally resolved a contested question in the government's favor only because of the excluded evidence, the error can be deemed harmless. *See, e.g.*, *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986). No such situation is presented in this case, or in Skilling's, *see Skilling* Pet. 23, 28.

though the jury was not required to find that he was a "principal offender"—was harmless. The Court held that it was, because even though the jury never found that the defendant was the "principal offender," "he was the only defendant charged in the indictment," and "[t]here was no evidence presented that anyone other than respondent was involved in the crime or present at the store." *Id.* at 18-19. In support of this conclusion, the Court cited *Neder*'s statement that "[w]here a defendant did not, and apparently could not, bring forth facts contesting the omitted element, answering the question whether the jury verdict would have been the same absent the error does not fundamentally undermine the purposes of the jury trial guarantee." *Id.* at 19.

This Court's precedents thus make clear that, even in the face of strong government evidence, an appellate court may not deem a trial error harmless if the defendant presented evidence contesting the government's case, such that there remains a triable issue of fact as to whether the defendant is guilty beyond a reasonable doubt. It is only when the evidence, viewed as a whole, is so overwhelmingly one-sided that no juror who had originally voted to convict on the tainted record could rationally have voted to acquit on a clean one, that an error may properly be deemed harmless under the objective approach to harmless-error reflected in *Neder*.

B. Any Other Reading Of *Neder* Conflicts With The Fundamental Right To Have Guilt Determined By A Jury, Not An Appellate Panel

The conclusion that an appellate court cannot deem a trial error harmless when a rational juror who found the defendant guilty in the original trial could have acquitted absent the error is compelled not only by this Court's precedents, but also by the jury trial guarantee found in Article III and the Sixth Amendment. That ancient right—which Blackstone described as "the grand bulwark of [the Englishman's] liberties," *Neder*, 527 U.S. at 30 (Scalia, J., concurring in part and dissenting in part) (alteration in original) (quoting 4 W. Blackstone, Commentaries *349)—guarantees that questions of guilt will be determined by a jury, not a judge. A jury's "overriding responsibility is to stand between the accused and a potentially arbitrary or abusive Government that is in command of the criminal sanction." *U.S. v. Martin Linen Supply Co.*, 430 U.S. 564, 572 (1977). "For this reason, a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict, *regardless of how overwhelmingly the evidence may point in that direction*." *Id.* at 572-73 (emphasis added; citations omitted).

In a harmless-error case, of course, the defendant has already been convicted by a jury. But the jury's conviction was, by hypothesis, based on a tainted record. Thus, the question must be whether the jury *necessarily* would have reached the same verdict absent the taint. And *Neder* recognizes that the only way to reach that judgment, absent conclusive evi-

dence from the original jury verdict that the error did not matter (*supra* note 2), is to ask whether a rational juror who found the defendant guilty on the record tainted by the error *could* have voted to acquit, if the error had never affected the proceedings. If a defendant presents literally no defense on an issue, as was the case in *Mitchell* (and is often the case), or presents a defense that is utterly irrational (e.g., he was exploring Pluto when the crime occurred), then the court of appeals does not invade or trammel upon the jury-trial right in affirming the conviction. In such cases, *Neder* suggests, the general interest in punishing the guilty outweighs the right to have all determinations of guilt made by a jury, as only an unreasonable jury ignoring its legal duties could vote to acquit in such cases, and appellate courts need not presume irrationality in the jury room.

It is a different case entirely, however, when a rational jury *could* have voted to acquit based on the evidence presented at trial—even if the court of appeals judges themselves strongly believe the evidence favored conviction. When the government presents a strong but contested case, the contest must be decided by a jury, not by an appellate panel after the fact. Any other approach would deny the defendant his Sixth Amendment right to a jury determination of his guilt.

II. THE SEVENTH CIRCUIT'S HARMLESS-ERROR ANALYSIS IS INCONSISTENT WITH *NEDER* AND THE SIXTH AMENDMENT RIGHTS IT SAFEGUARDS

Regardless whether the Seventh Circuit should have considered the impact of the particular error in this trial on the particular jury that determined Vasquez's guilt, the Seventh Circuit clearly misapplied this Court's harmless-error jurisprudence. Though purporting to examine "the evidence as a whole" when conducting its harmlessness analysis, Pet. App. 17A, the Seventh Circuit ignored entirely the evidence put forth by Vasquez at trial in support of his defense. Because that evidence plainly sufficed to establish a triable issue of fact concerning Vasquez's guilt, the admission of his lawyer's statement cannot now be deemed harmless—under the Sixth Amendment, only a jury, untainted by the lawyer's statement, may decide whether Vasquez is guilty.

A. The Seventh Circuit's Harmless-Error Analysis Wrongly Considered Only The Government's Evidence, And Ignored The Defendant's

1. Vasquez and two co-defendants, Joel Perez and Carlos Cruz, were arrested following a failed cocaine deal that was intercepted when Alejandro Diaz, another putative participant in the transaction who was cooperating with law enforcement agents, tipped off his contact with the DEA. Pet. App. 3A-4A. The facts surrounding the crime are fairly straight-forward. The deal was set in motion when Perez contacted Cruz about obtaining a kilogram of

cocaine. *Id.* at 3A. Cruz then called Diaz, whom he knew to have been involved in selling cocaine. *Id.* Cruz, Perez, and Diaz arranged for the deal to take place on August 5, 2008.

On that day, Cruz and Perez drove to a Shell gas station, where they met Diaz. *Id.* Diaz instructed them to follow him to a second location to get the drugs, but Perez instead walked to a Denny's parking lot next door, where Vasquez was waiting for him, driving Perez's black Bonneville. *Id.* Perez got in the car with Vasquez and called Cruz to tell him that he wanted to complete the deal at the current location, rather than following Diaz to another site. *Id.* Cruz then followed Perez to the Denny's lot. *Id.* Diaz called Cruz to find out why he wasn't following him, and Cruz told Diaz that Perez wanted to complete the deal in the parking lot. *Id.* Perez instructed Cruz to tell Diaz "we got the money here," and Vasquez supposedly repeated the statement. *Id.* at 3A-4A. Cruz hung up, under the impression that Diaz was returning to the Shell station to complete the deal. *Id.* at 4A.

A few minutes later, after Diaz had contacted his DEA handler, law enforcement agents surrounded the parking lot and approached the Bonneville to arrest Cruz, Perez, and Vasquez. *Id.* As the officers approached the car, Cruz raised his hands to surrender, but Vasquez—with Perez still in the passenger seat—put the car in reverse, striking two police vehicles. *Id.* He then shifted course and headed for the exit. *Id.* Vasquez sped away, and when the police located the Bonneville in a nearby Walmart parking lot several minutes later, Vasquez was nowhere to be found. *Id.* A bystander told the police

that he had seen two men run from the car toward a McDonald's, and a detective pursued Vasquez and Perez on foot through the kitchen of the McDonald's and out the back door. *Id.* The police successfully apprehended both men and found a cell phone on Vasquez and two on Perez. *Id.* Phone records showed that several calls were made between Vasquez and Perez on the day before and the day of the arrest. *Id.* at 4A-5A. After the Bonneville had been towed to the police station, a search uncovered $23,000 in cash in a hidden compartment in the car. *Id.* at 5A.

Vasquez's key witness in support of his defense at trial was Perez's wife, Marina. *Id.* at 6A, 12A. Marina testified that her husband had asked her to pick him up at the scene of the failed drug deal that day, but she had asked Vasquez to go in her place. *Id.* at 12A. Vasquez agreed to do so and took Perez's black Bonneville, rather than his own car, as a matter of convenience. *Id.* If credited, Marina's testimony suggests that Vasquez had no idea that a drug deal was planned but instead showed up at the scene in the car with the hidden cash only by happenstance. *See id.*

The government was suspicious of Marina's story and sought a continuance based on recordings of telephone conversations between Marina and her husband, who was incarcerated at MCC at the time, that it had obtained. *Id.* at 12A-13A. The government insisted that these recordings went to the truthfulness and accuracy of Marina's testimony; Vasquez's counsel vigorously objected. *Id.* at 13A. The trial judge found that the "recordings were admissible as evidence of Marina's interest, bias and

prejudice, and of her prior inconsistent statements." *Id.* Specifically, the judge stated that "[w]ith respect to interest, bias, and prejudice ... if any of these statements can be interpreted as such to indicate an interest, bias or prejudice, *they would go in for their truth*." *Id.* at 16A (quotation omitted). The government re-called Marina to the stand as a rebuttal witness when the trial resumed and introduced the MCC recordings, which, among other things, included Marina telling her husband that Vasquez's lawyer had said that "everybody is going to lose" if they go to trial. *Id.* at 13A-14A.

A jury convicted Vasquez of conspiring to possess more than 500 grams of cocaine with intent to distribute. *Id.* at 2A, 6A. The jury, however, found Vasquez not guilty on a second count charging him with attempted possession with intent to distribute more than 500 grams of cocaine. *Id.* at 5A-6A.

2. On appeal, the Seventh Circuit found that the trial judge erred in admitting the MCC recordings into evidence for their truth. *Id.* at 16A; *see also id.* at 18A (Hamilton, J., dissenting). The Seventh Circuit majority noted, however, that this error would only warrant reversal of Vasquez's conviction and remand for a new trial if it was not harmless. *Id.* at 16A (citing *U.S. v. Olano*, 507 U.S. 725, 734 (1993)). The majority recited the following test for harmless error: "whether, in the mind of the average juror, the prosecution's case would have been significantly less persuasive had the improper evidence been excluded." *Id.* at 16A-17A (quoting *U.S. v. Emerson*, 501 F.3d 804, 813 (7th Cir. 2007)). The burden of proof on the harmlessness inquiry, the court stated, "lies on the government to prove that a reasonable jury

would have reached the same verdict without the challenged evidence." *Id.* at 17A (citing *U.S. v. Williams*, 493 F.3d 763, 766 (7th Cir. 2007)).

The Seventh Circuit majority proceeded to review the record. The court stated that it was "[l]ooking at the evidence as a whole" to determine whether the trial judge's error in admitting the MCC recordings was harmless. *Id.* at 17A. The court detailed the evidence that formed the government's case against Vasquez: Vasquez's flight from the crime scene, the cell phone logs showing that Vasquez had repeatedly contacted Perez prior to the aborted drug deal, Vasquez supposedly telling Cruz to "tell him we got the money here," similarities between the drug deal intercepted by police here and that underlying Vasquez's prior drug conviction in 2002, and the $23,000 in cash hidden in the Bonneville that Vasquez was driving. *Id.* at 17A-18A. Against this backdrop, the Seventh Circuit reasoned that "[t]his evidence ... would have moved the jury to convict without a nudge from anything it heard in the government's rebuttal case," which included the improper introduction of the MCC recordings to refute Marina's testimony in support of Vasquez's defense. *See id.* at 18A.

Inconsistent with its assertion that it "look[ed] at the evidence as a whole," however, the court took no notice of any evidence that Vasquez put forth to contest the government's case against him. That evidence included Marina's testimony that Perez had asked her to pick him up that day, but she had asked Vasquez to go instead (suggesting Vasquez lacked both the knowledge and intent required to conspire). A rational juror (absent the error) could have relied

on this innocent explanation of Vasquez's presence at the scene to acquit him on the conspiracy charge. There was no more powerful proof of this rational possibility than the juror's actual decision on the evidence before it to acquit Vasquez on the intent-to-distribute charge.

B. The Seventh Circuit's Harmless-Error Analysis Is Inconsistent With *Neder*

As noted, the list of evidence catalogued in the Seventh Circuit's brief review of the trial record omitted entirely any evidence that Vasquez had presented in support of his defense, which was premised on the assertion that "he was only an innocent bystander who just happened to be in the wrong place at the wrong time." Pet. App. at 12A. Such evidence, however, clearly existed: in its description of the proceedings at trial, the Seventh Circuit majority itself noted that "Vasquez called several witnesses, including Perez's wife, Marina," in support of his defense. *Id.* at 6A. The Seventh Circuit majority's failure to take this evidence contesting the government's theory of the case into account when conducting its harmless-error review is at odds with this Court's decision in *Neder*.

As Judge Hamilton, dissenting below, put it, the majority essentially found that the error in admitting the MCC recordings was harmless "because the government had so much other evidence against Vasquez." *Id.* at 23A. But as discussed above, the focus should have been on "whether the record contains evidence that could rationally lead to a contrary finding [i.e., an acquittal]," had the lawyer's statement been excluded. *Neder*, 527 U.S. at 19. In

order to make that determination, a court obviously must review and consider any evidence introduced at trial that might support "a contrary finding" by the jury. The Seventh Circuit majority simply did not do so in this case.

The record, however, indicates that Vasquez presented such evidence, which should have been taken into account in the harmlessness inquiry. For example, "Marina Perez's testimony provided an innocent explanation for Vasquez's presence on the scene in the car with the hidden money." Pet. App. at 25A (Hamilton, J., dissenting). Moreover, Cruz testified that Perez was not supposed to bring any money with him to the deal, at least arguably negating any inference of culpability to be drawn from the cash hidden in the Bonneville that Vasquez was driving. *See id.* And Cruz's testimony that Vasquez had said "tell him we got the money here" at the scene of the crime was subject to strong credibility attacks: Cruz was a cooperating witness who admitted on the stand that he had lied to the government about Vasquez, and he acknowledged that he first told the government only a week before the trial that Vasquez had made this alleged statement. *Id.* at 25A-26A. There was thus at least a plausible basis for the jury to discredit Cruz's testimony that Vasquez had said "tell him we got the money here."

In short, despite the majority's cursory review of the record, Vasquez cast doubt on several features of the government's case and presented credible evidence of his own that, if believed, could have supported his account of how he innocently found himself at the scene of the deal. Whether or not Vasquez's defense was sufficient to warrant his ac-

quittal on the conspiracy charge was, of course, a question for the jury to decide. *See Neder*, 527 U.S. at 19 ("A reviewing court making this harmless-error inquiry does not ... become in effect a second jury to determine whether the defendant is guilty." (quotation omitted)). But in order for a reviewing court to fulfill its function of "ask[ing] whether the record contains evidence that could rationally lead to a contrary finding," *id.*, that court must actually review and consider the *entire record* to judge whether it contains a sufficient basis to permit a reasonable jury to find in the defendant's favor (or whether the original guilty verdict necessarily resolved all triable issues of fact in the government's favor). The Seventh Circuit majority's failure to address the entire record reflects its deeper analytical error, *viz.*, evaluating harmlessness by examining only the strength of the government's case, rather than by asking whether there were triable issues of fact that could have been resolved in the defendant's favor absent the error.

III. THE FIFTH CIRCUIT'S HARMLESSNESS ANALYSIS IS SIMILARLY INCONSISTENT WITH *NEDER*

The Fifth Circuit's finding of harmlessness in Skilling's case was, if anything, even more at odds with *Neder* than the decision below. But it exemplifies the kind of misunderstanding and misuse of the *Neder* standard that all too commonly characterizes harmless-error review in the lower courts.

The defense evidence in Skilling's case was extensive. *Skilling* Pet. 8-20. Yet the Fifth Circuit ignored Skilling's evidence, believing that its task un-

der *Neder* was not to decide whether it was clear beyond a reasonable doubt that a rational jury would have found Skilling guilty absent the error, but merely to determine whether "the evidence presented at trial proves that Skilling conspired to commit securities fraud." *Id.* at 23. Applying that incorrect standard, the Fifth Circuit found the error in Skilling's case—the inclusion of an invalid "honest services" fraud charge—to be harmless, because in its view, the government's evidence supporting the valid legal theory (securities fraud) was "overwhelming." *Id.* at 24.

Had the Fifth Circuit applied the appropriate legal standard, the court would have had no choice but to find the error non-harmless. As extensively detailed in Skilling's petition for certiorari, Skilling contested the government's securities-fraud case at every step. *Id.* at 8-20. Indeed, even the government never argued to the Fifth Circuit that the error in Skilling's case was harmless because its evidence of guilt on securities fraud was "overwhelming."[3] On the contrary, one lead prosecutor acknowledged after trial that the case against Skilling was plagued by "fundamental weaknesses," because Skilling "took steps seemingly inconsistent with criminal intent," there were "no 'smoking gun' documents," and prosecutors relied heavily on cooperating witnesses who had "marginal credibility." Hueston, *Behind the*

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[3] The government instead argued that its honest-services fraud case was essentially identical to its securities-fraud case, so the court could be confident that the actual verdict reflected a valid guilty finding on securities fraud. The Fifth Circuit squarely (and correctly) rejected that argument. *Skilling* Pet. 23, 28.

Scenes of the Enron Trial, 44 Am. Crim. L. Rev. 197, 197-98, 201 (2007). Under any plausible reading of *Neder*, the Fifth Circuit's harmlessness determination was plainly incorrect.

Even more egregious, the Fifth Circuit expressly recognized that Skilling's own testimony "contested his liability under any theory of guilt." *Skilling* Pet. 35. Yet the court wholly ignored Skilling's testimony, finding it to have been "self-serving," and determining that the jury must have already rejected it by rendering its original guilty verdict. *Id.* at 24. The latter finding was, of course, incorrect—the jury may well have believed Skilling's testimony as to the valid securities-fraud count, but disbelieved him on the invalid honest-services count. And the court's former finding—that the testimony was "self-serving" and thus unworthy of belief—is a classic question for the jury, and one the Fifth Circuit could not have more directly and erroneously usurped in affirming Skilling's conviction. Indeed, the trial record makes clear beyond all doubt that the jury *did not* fully reject Skilling's testimony. After hearing Skilling's extensive testimony in his defense (something Vasquez did not offer), and the government's evidence that Skilling engineered an alleged "pump and dump" scheme to inflate Enron's stock price and then sell his shares of Enron stock, the jury *acquitted* Skilling on nine of ten counts of insider trading, *id.* at 35-36—acquittals on which this Court relied as key evidence that the jury was not biased against Skilling. *See Skilling*, 130 S. Ct. at 2916.

The Fifth Circuit's decision undermined the fundamental role of the jury in determining guilt and innocence. But that is the necessary consequence of

applying the "overwhelming evidence" test, rather than the analysis required by *Neder* and the Sixth Amendment. On the full record, the government's case against Skilling was neither overwhelming, nor undisputed, nor bereft of rational bases on which a reasonable jury could acquit Skilling of the only valid legal theory of conspiracy the government put forth. The Fifth Circuit in Skilling's case, like the Seventh Circuit below, could find harmlessness only by improperly acting as the thirteenth juror. A proper application of the harmless error standard in this case will help ensure that courts do not make the error the Fifth Circuit made in Skilling, and that other courts make all too frequently in other cases.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment below, as well as the judgment of the Fifth Circuit in Skilling's case.

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 11-199

In The Supreme Court of the United States

ALEXANDER VASQUEZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF TEXAS, ALABAMA, ARIZONA, COLORADO, DELAWARE, FLORIDA, HAWAI'I, ILLINOIS, INDIANA, KENTUCKY, LOUISIANA, MAINE, MICHIGAN, NEBRASKA, SOUTH CAROLINA, WISCONSIN, AND WYOMING AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE

The amici curiae States have an interest in promoting a harmless-error jurisprudence that respects the finality of their criminal convictions and preserves the States' scarce prosecutorial resources.

STATUTE AND RULE INVOLVED

28 U.S.C. § 2111 states:

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

FED. R. CRIM. P. 52(a) states:

> Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

STATEMENT

Petitioner Alexander Vasquez was convicted of drug offenses after the trial court erroneously admitted recordings of a telephone conversation between a defense witness and one of Vasquez's co-defendants. Petitioner contends that on that tape, a defense witness states that Vasquez's lawyer had urged him to enter a blind guilty plea because, in the lawyer's view, "everybody is going to lose" if they go to trial. The Seventh Circuit affirmed the conviction after concluding that this evidentiary error was harmless. *See United States v. Vasquez*, 635 F.3d 889 (7th Cir. 2011).

SUMMARY OF ARGUMENT

There are two ways by which the government can show that a trial error is "harmless." One is to demonstrate that the evidence of guilt is so strong that no reasonable jury would have acquitted absent the error. Consider a case in which an involuntary confession is erroneously admitted into evidence. Although this error could be highly prejudicial if the remaining evidence of guilt is thin, the prosecution can establish "harmless error" if the properly admitted evidence of guilt is so overwhelming that the error could not have changed the jury's verdict. *See, e.g., Arizona v. Fulminante*, 499 U.S. 279, 311-312 (1991).

Another way to demonstrate harmless error is by focusing not on the evidence of guilt at trial but on the inherent insignificance of the error. If, for

example, an indictment mistakenly omits an element of the crime, or if an evidentiary ruling allows the introduction of irrelevant but nonprejudicial evidence, then these types of errors will have no marginal effect on a jury's deliberations. These errors will be harmless even in cases in which the evidence of guilt leaves room for debate.

Each of these approaches provides an independent and sufficient means for the government to show the absence of a causal link between the error and the judgment. Vasquez therefore presents this Court with a false dilemma—both in his petition for writ of certiorari and in his brief on the merits. There is no need for this Court to bless only one of these as the "correct" approach to harmless error, while discarding the other as mistaken. These approaches to harmless error can and do co-exist—which is precisely why, as Vasquez noted in his petition for writ of certiorari, "there are no cases in which one circuit explicitly cites another circuit's decision and disagrees with it." *See* Pet. at 4.

By asking this Court to choose between these approaches, Vasquez wants this Court to repudiate a perfectly valid method of establishing harmless error. This Court should decline the invitation and affirm the Seventh Circuit's judgment.

ARGUMENT

The Government Can Establish Harmless Error *Either* By Relying On The Admissible Evidence Of Guilt *Or* By Showing That The Error Had No Influence On The Jury.

Errors that occur at trial can be harmless in one of two ways. Some errors are deemed harmless because the error only adds to an already-overwhelming case for guilt. The error may be significant—as in the case of a wrongfully admitted confession. But if the admissible evidence of guilt would have pushed any reasonable jury past the tipping point, then the error does not affect "substantial rights" under 28 U.S.C. § 2111 or FED. R. CRIM. P. 52(a). These types of errors are akin to medical malpractice committed on a patient who dies of natural causes during the operation, or a defender in football who "interferes" with a receiver when the pass is clearly uncatchable. In these situations, there is no causal link between the wrongdoing and the outcome—even though this type of error might be outcome-determinative in a different set of circumstances.

Other errors are harmless because they are too trifling or technical to have affected a reasonable jury's consideration of the case. In these situations, the government can establish harmless error without asking the court to review the independent evidence of guilt; the error is harmless because it made no marginal contribution to the jury's decision.

Vasquez, however, is mistaken to suggest that this is the *only* permissible means for the government to establish harmless error under 28 U.S.C. § 2111 and FED. R. CRIM. P. 52(a). Either of these approaches is a valid means of establishing that the jury would have reached the same verdict absent the error, and each of these approaches finds support in the decisions of this Court.[1] *Compare Harrington v. California*, 395 U.S. 250 (1969) ("[A]part from [the inadmissible confessions] the case against [defendant] was so overwhelming that we conclude that this violation of Bruton was harmless beyond a reasonable doubt . . . ."), *with Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946) ("If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a

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[1] It is important to note that neither of these approaches to harmless error is more government-friendly in the abstract. Vasquez argues for the second approach because the error in his case will more likely be found harmful if this Court disregards the "overwhelming evidence" test and focuses solely on whether the error had a marginal effect on the jury's deliberations. But cases can be found in which the criminal defendant embraces the "overwhelming evidence" approach to harmless error, while the government tries to establish harmlessness by emphasizing the error's lack of effect. *See, e.g., Brecht v. Abrahamson*, 944 F.2d 1363, 1370 (7th Cir. 1991), *aff'd*, 507 U.S. 619 (1993).

constitutional norm or a specific command of Congress.").

The touchstone for harmless-error analysis is whether "the jury verdict would have been the same absent the error." *Neder v. United States*, 527 U.S. 1, 17 (1999). Yet Vasquez contends that an error can be deemed harmful *even when* the admissible evidence establishes an overwhelming case for guilt. Vasquez would have this Court preclude a finding of harmlessness for any error that "influenced the jury," which (in Vasquez's view) should include errors that influence the jury by contributing to an already-overwhelming case for guilt. Pet. Br. at 9. Although Vasquez does not say this explicitly, he seems to believe that an error can "influence the jury" or "contribute to" a conviction even when it does not make a difference in the jury's ultimate decision—perhaps by reducing the number of hours that the jury spends deliberating, or buttressing the jurors' confidence in a verdict that they would have been certain to reach with or without the error.

That is not a sensible approach to harmless error. New trials impose costs, and Vasquez does not explain the benefits to be gained from re-trying a criminal defendant when the admissible evidence of guilt was so overwhelming that no reasonable factfinder could have voted to acquit. Vasquez does not even claim that he is factually innocent of the crimes for which he was convicted—either in his

petition for certiorari or his brief on the merits.[2] He therefore cannot claim that a new trial is likely to produce a more accurate outcome on the question of guilt or innocence. And the retrials required under Vasquez's theory of harmless error will cause many guilty criminals to go free. It is always difficult to retry criminal defendants years after the original trial, as memories fade and witnesses die or become harder to locate. Retrials also divert scarce prosecutorial resources away from other trials, which will lead to suboptimal plea bargains or foregone prosecutions in other cases.

Vasquez would be on stronger footing if the Sixth Amendment forbids appellate courts to base a harmless-error determination on the overwhelming evidence of a defendant's guilt. But the Sixth Amendment secures only the right to a "*trial* . . . by an impartial jury." U.S. CONST. amend. VI (emphasis added). It does not govern the standards by which an appellate court decides whether to overlook or

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[2] Vasquez carefully avoids any claim of actual innocence in his papers in this Court. *See, e.g.*, Brief on the Merits at 50 ("*[T]he defense argued that* Petitioner had a reason to flee that had nothing to do with Perez's drug deal.") (emphasis added); *id.* at 52 ("[S]ubstantial confusion regarding how the flight occurred . . . permitted defense counsel to forcefully argue that, to keep Perez from fleeing the police vehicles may have initiated the collision with the Bonneville before it moved at all.") (citation omitted); *id.* at 54 ("[Mrs. Perez's] testimony provided an innocent explanation for Petitioner's presence in the Bonneville at the scene of Perez's drug deal.").

order a new trial in response to an evidentiary error. There is no constitutional right even to appeal a criminal conviction. *See McKane v. Durston*, 153 U.S. 684, 687 (1894). If the Sixth Amendment can co-exist with a regime in which trial-court evidentiary errors cannot be appealed at all, it logically follows that the Sixth Amendment allows the States and the federal government to limit appellate relief to a subset of those errors—errors that have some probability of altering the outcome of a trial. *Sullivan v. Louisiana*, 508 U.S. 275 (1993), invoked the Sixth Amendment only because the defendant's *trial* had failed to produce a "jury verdict within the meaning of the Sixth Amendment" on account of the defective reasonable-doubt instruction. *Id.* at 280. *Sullivan* has no bearing on cases in which the trial and verdict comport with the Sixth Amendment, and some other error causes an appellate court to ponder whether a reversal of conviction is warranted. Vazquez does not (and cannot plausibly) argue that every nonconstitutional evidentiary error "vitiates all the jury's findings" under *Sullivan*. *Id.* at 281.

CONCLUSION

The judgment of the Seventh Circuit should be affirmed.

Respectfully submitted.

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